JUDGES

OF THE

COURT OF KING's BENCH,

During the Period of these REPORTS.

EDWARD Lord ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SIMON LE BLANC, Knt.
Sir JOHN BAYLEY, Knt.

ATTORNEY-GENERAL.

Sir VICARY GIBBS, Knt.

SOLICITOR-GENERAL.

Sir THOMAS PLUMER, Knt.

A
TABLE
OF THE
CASES REPORTED
IN THIS FOURTEENTH VOLUME.

N. B. Thofe Cafes which are printed in *Italics* were cited from MS. Notes.

Darley

Maillardet,

 Stoveld

ERRATA et ADDENDA in this VOLUME.

P. 27. l. 17. after "*ſitting in*" and before "*Parliament*" read "*or out of.*"
19. dele "*not*" and "*a part of.*"
24. dele "*magnum concilium in.*"

In VOL. XIII.

P. 453, &c. In the caſe of The King v. The Inhabitants of Smarden, "*Hedcom,*" read "*Hedcorn.*"
460 note (*a*), for "*defendant*" read "*plaintiffs*"
571. l. 3. and beginning of l. 4. for "*account*" read "*accept.*"

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CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Eaſter Term,

In the Fifty-firſt Year of the Reign of GEORGE III. 1811.

Sir FRANCIS BURDETT Bart. *againſt* The Right Hon. CHARLES ABBOT, Speaker of the Houſe of Commons.

To an action of treſpaſs againſt the Speaker of the houſe of commons for forcibly, and, with the aſſiſtance of armed ſoldiers, breaking into the meſſuage of the plaintiff (the outer door being ſhut and faſtened), and arreſting him there, and taking him to the Tower of *London*, and impriſoning him there; it is a legal juſtification and bar to plead that a parliament was held, which was ſitting during the period of the treſpaſſes complained of; that the plaintiff was a member of the houſe of commons; and that the houſe having reſolved "that a certain letter, &c. in *Cobbett's Weekly Regiſter*, was a libellous and ſcandalous paper, reflecting on the juſt rights and privileges of the houſe, and that the plaintiff, who had admitted that the ſaid letter, &c. was printed by his authority, had been *thereby* guilty of a breach of the privileges of that houſe;" and having ordered that for his ſaid offence he ſhould be committed to the Tower, and that the Speaker ſhould iſſue his warrant accordingly; the defendant, as Speaker, in execution of the ſaid order, iſſued his warrant to the ſerjeant at arms, to whom the execution of ſuch warrant belonged, to arreſt the plaintiff and commit him to the cuſtody of the lieutenant of the Tower; and iſſued another warrant to the lieutenant of the Tower to receive and detain the plaintiff in cuſtody during the pleaſure of the houſe; by virtue of which firſt warrant the ſerjeant at arms went to the meſſuage of the plaintiff, where he then was, to execute it; and becauſe the outer door was faſtened, and he could not enter, after audible notification of his purpoſe, and demand made of admiſſion, he, by the aſſiſtance of the ſaid ſoldiers, broke and entered the plaintiff's meſſuage, and arreſted and conveyed him to the Tower, where he was received and detained in cuſtody, under the other warrant, by the lieutenant of the Tower.

SIR *Francis Burdett*, Baronet, complains of the Right Hon. *Charles Abbott*, having privilege of parliament, of a plea of treſpaſs, for that the ſaid *Charles* heretofore,

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to wit, on the 6th of *April* 1810, and on divers other days and times between that day and the day of exhibiting this bill, with force and arms, &c. broke and entered a certain meſſuage of the ſaid Sir *Francis*, ſituate in the pariſh of *St. George Hanover-Square*, in the county of *Middleſex*, and on one of thoſe days, to wit, on the 9th of *April*, in the year aforeſaid, (the outer door of the ſaid meſſuage being then and there ſhut and faſtened,) with divers ſoldiers and men armed with offenſive weapons, forcibly and with ſtrong hands broke open a certain window and two window-ſhutters of and belonging to the ſaid meſſuage of the ſaid Sir *Francis*, and through the ſame broke into and entered the ſaid meſſuage, and made a great noiſe, diſturbance and affray in the ſaid meſſuage; and with force and arms made an aſſault on the ſaid Sir *Francis*, and laid hands upon him, and forced and compelled him to go from and out of his ſaid meſſuage into a certain public ſtreet there, and alſo then and there forced and obliged him to go into a certain coach in, through and along divers other public ſtreets and highways to a certain priſon called the Tower of *London*, and there impriſoned the ſaid Sir *Francis*, and kept and detained him in priſon there, without any reaſonable or probable cauſe whatſoever, for a long ſpace of time, to wit, from thence hitherto; contrary to the laws of this realm, and againſt the will of the ſaid Sir *Francis*; whereby he the ſaid Sir *Francis* during all the time aforeſaid was and ſtill is hindered from tranſacting his lawful affairs, &c. to wit, at the pariſh aforeſaid in the county aforeſaid.

2d Count.

And alſo for that the ſaid *Charles* heretofore, to wit, on the day and year laſt aforeſaid, with force and arms, &c. made another aſſault upon the ſaid Sir *Francis*, to wit, at the pariſh, &c. and then and there ſeized and laid hold of the ſaid Sir *Francis* with violence, and forced and compelled

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pelled him to go in, through and along divers public ftreets and highways to a certain prifon called the Tower of *London*, and then and there imprifoned the faid Sir *Francis* and kept *and detained him* in prifon there without any reafonable or probable caufe whatfoever for a long fpace of time, to wit, from thence hitherto; contrary to the laws of this realm and againft the will of the faid Sir *Francis*, whereby, &c. And alfo for that the faid *Charles* heretofore, to wit, on the day and year laft aforefaid, with force and arms, &c. made another affault upon the faid Sir *Francis*, to wit, at the parifh aforefaid, &c. and then and there imprifoned the faid Sir *Francis*, and kept and detained him in prifon there, without any reafonable or probable caufe whatfoever, for a long time, to wit, from thence hitherto; contrary to the laws of this realm and againft the will of the faid Sir *Francis*. There was a fourth count for a common affault.

3d Count.

4th Count.

The defendant pleaded, firft, not guilty, to the whole of the trefpaffes charged. And fecondly, as to the breaking and entering the faid meffuage of the faid Sir *Francis* on one of the faid days in the firft count of the faid declaration mentioned, to wit, on the 9th of *April* in the year aforefaid, (the outer door of the faid meffuage being then and there fhut and faftened,) and with the faid foldiers and men breaking open the faid window and window fhutters, and through the fame breaking into and entering the faid meffuage, and making a noife and difturbance in the faid meffuage, and making the faid affault on the faid Sir *Francis*, and laying hands upon him, and forcing and compelling him to go from and out of his faid meffuage into the faid public ftreet there, and alfo forcing and obliging him to go in the faid coach in through and along the faid ftreets and highways in the faid

Plea 1ft. General iffue. 2d Plea. Juftifying the breaking and entering of the plaintiff's houfe by the proper officer, whilft the outer door was fhut and faftened, for the purpofe of arrefting and imprifoning the plaintiff under the Speaker's warrant of commitment for a breach of the privileges of the houfe of commons; after audible notification of the purpofe and demand of admiffion, without effect; and the fubfequent arreft and imprifonment of the

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plaintiff in execution of such warrant.

said first count mentioned, to the said prison called the Tower of *London*, and there imprisoning him the said Sir *Francis*, and keeping and detaining him in prison there for the said space of time in the said first count mentioned: The said *Charles* says, that the said Sir *Francis* ought not to have or maintain his aforesaid action thereof against him the said *Charles*, because he says that long before and at the said time when, &c. in the introduction of this plea mentioned, and during all the time in the said first count mentioned, a parliament of our sovereign lord the now king was holden at *Westminster* in the county of *Middlesex*, and was and yet is sitting; and that long before and at the said time when, &c. in the introduction of this plea mentioned, and during all the time in the said first count mentioned, he the said *Charles* was and yet is a member of the commons house of the said parliament, and the Speaker of the said commons house of parliament; and the said Sir *Francis* also was and yet is a member of the said commons house of parliament, to wit, at *Westminster*, &c. And the said *Charles* further saith, that they the said *Charles* and the said Sir *Francis*, so being members of the said commons house of parliament as aforesaid, and the said *Charles* so being Speaker of the said commons house of parliament as aforesaid, heretofore and before the said time when, &c. in the introduction to this plea mentioned, to wit, on the 6th of *April* 1810, at *Westminster* aforesaid, the said parliament then and there sitting, it was in and by the said commons house of parliament resolved, that a letter signed "*Francis Burdett*," and a further part of a paper intituled "Argument," in *Cobbett's Weekly Register* of *March* 24th, 1810, was a libellous and scandalous paper, reflecting on the just rights and privileges of that house; and that Sir *Francis Burdett*, Bart. who had

That a parliament was held, and was sitting at the time of the trespasses complained of; of which the plaintiff and defendant were members, and the defendant speaker of the house of commons.

That the house resolved that a paper admitted by the plaintiff to be printed by his authority was a libel, reflecting on the privileges of the house, and that the plaintiff was thereby guilty of a breach of privilege;

had admitted the above letter and "Argument" to be printed by his authority, had been thereby guilty of a breach of the privileges of that houſe: and it was thereupon then and there in and by the ſaid commons houſe of parliament ordered, that Sir *Francis Burdett*, Bart. be for his ſaid offence committed to the *Tower* of *London*, and that Mr. Speaker do iſſue his warrants accordingly: as by the record and proceedings of the ſaid reſolutions and order remaining in the ſaid commons houſe of parliament, reference being thereto had, will more fully appear. Whereupon the ſaid *Charles*, ſo being ſuch Speaker as aforeſaid, in purſuance of the reſolutions and order aforeſaid, and according to the laws and cuſtoms of parliament, did, for the execution of the ſaid order, afterwards, and before the ſaid time when, &c. in the introduction to this plea mentioned, to wit, on the 6th of *April*, in the year aforeſaid, at *Weſtminſter* aforeſaid, in the county aforeſaid, as ſuch Speaker as aforeſaid, make and iſſue his certain warrant under his hand and name, as ſuch Speaker as aforeſaid, directed to the ſerjeant at arms attending the houſe of commons, or his deputy, to whom the execution of ſuch warrant then and there belonged; in and by which ſaid warrant, reciting that the houſe of commons had that day adjudged that Sir *Francis Burdett*, Bart., who had admitted that a letter ſigned "*Francis Burdett*," and a further part of a paper entitled "Argument," in *Cobbett's Weekly Regiſter* of *March* 24, 1810, was printed by his authority, (which letter and argument the ſaid houſe had reſolved to be a libellous and ſcandalous paper reflecting upon the juſt rights and privileges of the ſaid houſe,) had been thereby guilty of a breach of the privileges of the ſaid houſe; and that the houſe of commons had thereupon ordered that the ſaid Sir *Francis*

and ordered him to be committed to the Tower; and that the ſpeaker ſhould iſſue his warrants accordingly.

That the ſpeaker iſſued his warrant to the ſerjeant at arms to arreſt the plaintiff, and deliver him to the cuſtody of the lieutenant of the Tower;

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Burdett be for his said offence committed to his majesty's *Tower* of *London*: therefore it was required that the said serjeant at arms, or his deputy, should take into his custody the body of the said Sir *Francis Burdett*, and then forthwith deliver him over into the custody of the lieutenant of his majesty's *Tower* of *London*. And all mayors, bailiffs, sheriffs, under-sheriffs, constables, and head-boroughs, and every other person or persons were thereby required to be aiding and assisting to the said serjeant or his deputy in the execution thereof. And the said *Charles*, so being such Speaker as aforesaid, then and there, and before the said time when, &c. in the introduction of this plea mentioned, delivered the said warrant to *Francis John Colman*, Esq., then and there being the serjeant at arms attending the said house of commons, (to whom the said warrant was directed,) to be executed in due form of law. And the said *Charles* further says that he the said *Charles*, so being such Speaker as aforesaid, after the making of the said resolutions and order, and for the execution thereof, and according to the laws and customs of parliament, did, in pursuance of the said resolutions and order, and for the further execution of the said order before the said time when, &c. in the introduction of this plea mentioned, to wit, on the day and and year last aforesaid, at *Westminster*, &c. make his certain other warrant under his hand and name, as such Speaker as aforesaid, directed to the lieutenant of his majesty's Tower of *London* or his deputy; in and by which said last-mentioned warrant, reciting that the house of commons had that day adjudged that Sir *Francis Burdett*, Bart. who had admitted that a letter signed "*Francis Burdett*" and a further part of a paper intituled "Argument," in *Cobbett's Weekly Register* of *March* 24th 1810,

(such warrant requiring all peace officers and others to assist in the execution thereof;)

which warrant was delivered to the serjeant at arms to be executed in due form of law.

That the speaker issued another warrant to the lieutenant of the Tower to receive and detain the plaintiff during the pleasure of the house;

1810, was printed by his authority, (which letter and argument the ſaid houſe had reſolved to be a libellous and ſcandalous paper reflecting on the juſt rights and privileges of the ſaid houſe,) had been thereby guilty of a breach of the privileges of the ſaid houſe; and that the houſe of commons had thereupon ordered that the ſaid Sir *Francis Burdett* be for his ſaid offence committed to his majeſty's Tower of *London*: therefore it was required that the ſaid lieutenant of his majeſty's ſaid *Tower*, or his deputy, ſhould receive into his cuſtody the body of the ſaid Sir *Francis Burdett*, and him ſafely keep during the pleaſure of the ſaid houſe. And the ſaid *Charles*, ſo being ſuch Speaker as aforeſaid, then and there, before the ſaid time when, &c. in the introduction to this plea mentioned, delivered and cauſed the ſaid laſt-mentioned warrant to be delivered to the lieutenant of his majeſty's Tower of *London* aforeſaid, to be executed in due form of law. By virtue and in execution of which ſaid firſt-mentioned warrant the ſaid *Francis John*, as ſuch ſerjeant as aforeſaid, afterwards, to wit, at the ſaid time when, &c. in the introductory part of this plea mentioned, in order to arreſt the ſaid Sir *Francis*, and to convey and deliver him into the cuſtody of the lieutenant of his majeſty's ſaid Tower of *London*, to be kept and detained in priſon in the ſaid Tower, in obedience to the reſolutions and order aforeſaid, went to the ſaid meſſuage of the ſaid Sir *Francis*; and becauſe the outer door of the ſaid meſſuage of the ſaid Sir *Francis* was then and there ſhut and faſtened, ſo that the ſaid *Francis John* could not thereby enter the ſaid meſſuage, and the ſaid Sir *Francis* was then and there in the ſaid meſſuage, he the ſaid *Francis John*, then and there with a loud and audible voice, gave and cauſed to be given notice of the ſaid firſt-mentioned warrant,

which warrant was delivered to the ſaid lieutenant to be executed in due form of law.

That the ſerjeant at arms went to the plaintiff's houſe, [illegible], to execute the warrant;

and with an audible [illegible] his [illegible], and

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demanded admittance to execute his warrant:

and because the outer door was kept shut and fastened against him, and was refused by the plaintiff to be opened;

he, with the assistance of soldiers and armed men, broke into the house, and arrested the plaintiff, and conveyed him to the Tower, in execution of the first mentioned warrant.

rant, and that the said *Francis John* was then and there come to the said messuage to arrest the said Sir *Francis* by his body, by virtue thereof; and the said *Francis John* then and there required the outer door of the said messuage to be opened to him the said *Francis John*, and then and there required that the said *Francis John* might be admitted into the said messuage for the execution of the said first-mentioned warrant; and because the outer door of the said messuage was not opened to him the said *Francis John*, but was and continued to be kept shut and fastened against him the said *Francis John*, and the said Sir *Francis* then and there upon such request made to open the outer door of his said messuage, then and there wholly refused and omitted so to do; he the said *Francis John*, at the said time when, &c. in the introduction to this plea mentioned, with and by the aid and assistance of the said soldiers and men broke open the said window and window shutters, and through the same broke into and entered the said messuage; the same then and there being a convenient mode of entering the said messuage for the purpose aforesaid; and then and there gently laid his hands on the said Sir *Francis* to arrest him, and did then and there arrest him by his body, by virtue and in execution of the said first-mentioned warrant; and then and there in order to convey the said Sir *Francis* to his majesty's said Tower of *London* in execution of the first-mentioned warrant, and in obedience to the resolutions and order aforesaid, forced and compelled the said Sir *Francis* to go from and out of his said messuage into the said public street, and also forced and obliged him to go in the said coach in, through, and along the said streets and highways, in the introduction to this plea mentioned, in the way to the said Tower of *London* from his said messuage;

and

and then and there delivered him the said Sir *Francis* into the custody of the lieutenant of the said Tower of *London*, to be kept and detained in prison there, in obedience to the resolutions and order aforesaid: and the said lieutenant then and there received the said Sir *Francis*, and detained and imprisoned him in the said Tower, according to the said warrant herein secondly before-mentioned: and in so doing the said *Francis John* did necessarily and unavoidably make a little noise and disturbance in the said messuage, he the said *Francis John* making as little noise and disturbance and doing as little injury as he could on that occasion: which are the same several supposed trespasses in the introductory part of this plea mentioned, and whereof the said Sir *Francis* hath above in the first count complained against him the said *Charles*: with this, that the said *Charles* doth aver, that the said Sir *Francis*, the now plaintiff, and the said Sir *Francis Burdett* in the said resolutions, order, and warrants respectively mentioned was and is one and the same person; and that at the said several times in this plea mentioned, and during all the time therein mentioned the said parliament was and is sitting, to wit, at *Westminster* in the county of *Middlesex*: and this the said *Charles* is ready to verify; wherefore he prays judgment if the said Sir *Francis* ought to have or maintain his aforesaid action thereof against him, &c.

That the lieutenant of the Tower received and detained the plaintiff there, by virtue of the last-mentioned warrant.

The second justificatory plea was the same as the first, only that it confined the justification to the arrest of Sir *Francis*, as mentioned in the first count, and to the forcing and compelling him to go from his house into the public street, and forcing him to go in a coach through the streets to the Tower, and there imprisoning him, and keeping

2d Plea, the same; only omitting the breaking of the door.

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keeping and detaining him there during the time mentioned in the first counts; omitting to justify the breaking and entering of his house whilst the outer door was shut and fastened, with the assistance of the soldiers, &c. in the same count also mentioned. And at the conclusion of this plea was the following traverse:—Without this, that the said *Charles* is guilty of the said supposed trespasses or any of them in the introduction to this plea mentioned otherwise, or in any other manner, than by the making, signing, issuing, and delivering of the said warrants as such Speaker as aforesaid, in pursuance of the resolutions and order aforesaid, in manner and form as in this plea is before alleged; and this the said *Charles* is ready to verify: wherefore he prays judgment if the said Sir *Francis* ought to have or maintain his aforesaid action thereof against him, &c.

Replication, joining issue on the 1st plea, and demurring generally to the 2d and 3d pleas.

The plaintiff joined issue to the country on the first plea of not guilty. And as to the second plea to the several trespasses in the introductory part of that plea mentioned, and therein attempted to be justified, the plaintiff saith that he by reason of any thing by the defendant in that plea alleged ought not to be barred from having and maintaining his action thereof against the defendant, because the same plea of the defendant in form aforesaid pleaded, and the matter therein contained are not sufficient in law to bar the plaintiff's action, nor is he bound by law to answer it; and this he is ready to verify: wherefore for want of a sufficient plea in this behalf the plaintiff prays judgment, and that his damages on occasion of committing those trespasses may be adjudged to him. And there was the like general demurrer to the third plea. The defendant joined in the demurrers.

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The cafe was argued by *Holroyd* for the plaintiff, in fupport of the demurrers, on *Friday* the 8th of *February* in laft *Hilary* term; but owing to the prefs of bufinefs towards the conclufion of the term, and the neceffary time required for the further argument of the cafe, it was adjourned to *Eafter* term; and on *Friday* the 17th of *May* in that term Sir *Vicary Gibbs*, Attorney-General, was heard on the part of the Speaker; and on the fame day *Holroyd* replied for the plaintiff; immediately after which the Court gave judgment.

Holroyd argued thus for the plaintiff. The firft and moft important queftion is, whether this Court can take cognizance of the queftion concerning privilege of parliament which is brought in judgment before it in this caufe. Lord *Coke* fays in his *4th Inft.* 15. (which will be mainly relied on for the defendant,) that "the high court of parliament fuis propriis legibus et confuetudinibus fubfiftit: that it is lex et confuetudo parliamenti (*a*) that all weighty matters in any parliament moved concerning the peers of the realm, or commons, in parliament affembled, ought to be determined, adjudged, and difcuffed by the courfe of the parliament, and not by the civil law, nor yet by the common laws of this realm (*b*) ufed in more inferior courts, which was fo declared to be fecundum legem et confuetudinem parliamenti, concerning the peers of the realm, by the king and all the lords fpiritual and temporal: *and the like, pari ratione, is for the commons* (*c*), for any thing *moved or done in the houfe of commons*: and the rather, for that by another law and cuftom of parliament the king cannot take notice

(*a*) Lord *Coke* refers in the margin to *Rot. Parl.* 11 *R.* 2. N°. 7.

(*b*) Refers to 1 *Inft.* *f.* 3. verb. en la Ley.

(*c*) Refers to *Rot. Parl.* 2 *H.* 4. No 11. *Rot. Parl.* 3 *H.* 6. In le Countee de *Ma-fhall's* cafe, *Rot. Parl.* 27 *H* 6. No. 18. The Earl of *Arundel's* cafe.

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notice of any thing said or done in the house of commons but by the report of the house of commons: and every member of the parliament hath a judicial place, and can be no witness." And then Lord *Coke* proceeds to state, "And this is the reason *that judges ought not to give an opinion of a matter of parliament, because it is not to be decided by the common laws, but secundum legem et consuetudinem parliamenti: and so the judges in divers parliaments have confessed* (*a*), &c." The only authority cited by Lord *Coke* for this position is *Thorpe*'s case; which, whether it bear him out or not, will be seen in its turn. But he having so stated it; and it having been further said by a very learned commentator (*b*) on the law, that the privileges of parliament are indefinite for the safeguard of its members; it is necessary first to ascertain whether that doctrine be correct, whether this Court have not the power to inquire of and decide upon the legem et consuetudinem parliamenti when it comes incidentally before them, in order to determine whether the particular case in judgment be or be not governed by that law and custom; for it would be in vain to argue what the judgment of the Court ought to be in this case, if it have no jurisdiction to meddle with the question of privilege at all: if when the house of commons have declared that any act whatever is a breach of their privilege, it were incompetent to the courts of law to take further cognizance of the subject matter.

To consider the question first upon principle and analogy; it would be strange if the privileges of parliament were *indefinite*, if by that word were meant *undefinable and unlimited*, when even the prerogatives of the king are definable and limited; when the rights and liberties

(*a*) Refers to *Rot. Parl.* 31 *H.* 6. No. 26, 27, 28. Baron *Thorpe*'s case.

(*b*) 1 *Blac. Com.* 164.

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of the people are alfo defined and limited by the fame law which confers them: neither are they lefs fecure on that account, but their certainty is the very caufe of their fecurity. The fame muft be the cafe with refpect to the lex et confuetudo parliamenti. Every *law* muft in its nature be definable and defined, however perfons may differ as to its application. As every fubject is bound and prefumed to know the extent of the king's prerogative, becaufe he is punifhable if he infringe it; fo he muft take cognizance of the privileges of parliament, that he may not offend againft or oppofe them when juftly exercifed. But how can he fecure himfelf againft offence, if the law which he is to obey be not known, nor capable of being known? With what reafon therefore can it be faid that the privileges of parliament are a matter of which the judges cannot take cognizance, when every fubject in the kingdom is bound to know them at his peril? Lord *Coke* himfelf however in another place (*a*), after ftating that the judges are affiftants to the lords, to inform them of the common law, but that " it doth not belong to them *(as hath been faid)* to judge of any law, cuftom, or privilege of parliament," proceeds to point out the fources from whence the law of parliament is to be derived: " and to fay the truth, the laws, cuftoms, liberties, and privileges of parliament are better to be learned out of the rolls of parliament and other records, and by precedents of continual experience, than can be expreffed by any one man's pen." And he alfo tells us (*b*) from *Fleta*, " Ifta lex ab omnibus eft quærenda, à multis ignorata, à paucis cognita." Applying then to the fources of knowledge to

(*a*) 4 *Inft.* 50.

(*b*) 4 *Inft.* 15. in the margin, quotes *Fleta, lib* 2. *cap.* 2.

which

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which Lord *Coke* himfelf has referred, it will appear from the current of cafes, when duly confidered, that the judges are bound to take cognizance of the law of parliament, as of every other part of the law of the land; and of thofe cafes which may appear to clafh, fome are diftinguifhable from the prefent, and others have been over-ruled by high authority. It will appear too from Lord *Hale*'s Hiftory of the Common Law (*a*) that the lex et confuetudo parliamenti is not to be confidered as oppofed to the common law, but a part of it: for in treating of the lex non fcripta, he fays that under that term he includes not only general cuftoms, or *the common law* properly fo called, but even thofe more particular laws and cuftoms applicable to certain courts and perfons. Therefore though the law of parliament be fometimes contrafted with the common law, that is only where the term *common law* is ufed in a narrow fenfe, as applying only to a particular branch of it; in the fame manner as it may be contrafted with the lex prerogativæ, or the lex foreftæ, or the lex mercatoria, all which Lord *Hale* ftates to be branches of the common law, ufed in its large and general fignification. In like manner the lex parliamenti is part of the common law, applied to the rights and privileges of parliament; not fuperfeding the common law, as differing from it like the civil or admiralty law, or as the lex militaris, which formerly prevailed in the court before the conftable and marfhal of the realm; but as a branch of the fame common law, part of the lex terræ, and therefore as fuch muft be equally capable of being known, and muft be taken to be known to the judges of the land, and they are equally bound to take

(*a*) P. 22 & 25.

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cognizance of it when brought incidentally in judgment before them in the courts of law, the fame as of any other branch of the lex non fcripta or common law. It was fo confidered by Lord *Holt* in the cafe of the *Aylefbury Men* (*a*), where he faid, "We are bound to take notice of the cuftoms of parliament, for they are part of the law of the land, and there are the fame methods of knowing them as the laws in *Weftminfter-hall*." And as the fame very learned judge faid in *Knollys*'s cafe (*b*), (who pleaded his peerage of Earl of *Banbury* to an indictment for murder pending in this court,) "the lex parliamenti muft be looked on as the law of the kingdom: but admitting it were a particular law, yet if a queftion arife determinable in the King's Bench, the King's Bench muft determine it." Again, if this were not part of the common law, a commitment under the law and cuftom of parliament would be againft *Magna Charta*, which provides that nullus liber homo capiatur vel imprifonetur, &c. nifi per legale judicium parium fuorum, vel *per legem terræ*; and againft fubfequent ftatutes, particularly the 28 *Ed.* 3. *c.* 3. which is an expofition and declaration of the other; providing that "no man fhall be imprifoned, &c. without being brought in to anfwer by due procefs of the law." Lord *Hale* in his Hiftory of the Common Law (*c*) fays, "touching the ftyles and appellations of the common law, and the reafons of it, it is called fometimes by way of eminence *lex terræ*, as in the ftatute of *Magna Charta*, *c.* 29., where certainly the common law is at leaft principally intended by thofe words, aut *per legem terræ*, &c." But fuppofing the law of parliament were a diftinct law, fuperfeding the common law, like the civil or admiralty law, ftill it would be ne-

Magna Charta, 9 *H* 3. *c.* 29. 2 *Ed.* 3 *c* 8. 5 *Ed.* 3. *c.* 9. 25 *Ed.* 3. *c.* 4. 28 *Ed.* 3. *c.* 3. 37 *Ed.* 3. *c.* 18. 42 *Ed.* 3. *c* 3.

(*a*) 8 *St. Tr.* 162. (*b*) *Salk.* 512. (*c*) P. 53.

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ceffary for this Court, upon the queftion arifing incidentally or collaterally before them, to judge of the law and cuftom of parliament, in the fame manner as it does of the civil or admiralty law when brought in queftion judicially before it, in order to afcertain to what extent the one fuperfedes the other, and the bounds of each of them refpectively. And though the law of parliament heretofore received may be expounded and applied from time to time as particular occafions arife; yet it cannot be extended or altered in derogation of the common law, without the authority of the whole legiflature: in like manner as Lord *Hale* fays (*a*) of the common law, that "though the ufage, practice, and decifions of the king's courts of juftice may expound and evidence it, and be of great ufe to illuftrate and explain it, yet it cannot be authoritatively altered or changed but by act of parliament." A judgment therefore of the king's courts in a particular cafe does not make a new law, but only expounds and evidences, as Lord *Hale* fays, the common law which exifted before; fo that if frefh lights fhould afterwards difcover fuch judgment to have been wrong, the evidence is not of fuch a binding nature, but that it may be revifed, and a better expofition of the law adopted in future. In like manner no refolution of either houfe of parliament, taking it to have decided judicially upon the matter before it, can make that a legal privilege of parliament which was not fo before by law: it may be of great ufe and weight, as evidence to expound the law; but if it were afterwards fhewn to be erroneous, it would not be binding; for a new privilege can only be created by act of parliament. In this view the matter has always been

(*a*) *Hift. of Com. L.* 26.

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considered, not only by the courts of law, when such questions have come incidentally in review before them, but also by the houses of parliament, whenever there has been any question in either, whether it were entitled to such a privilege or not. Whether therefore the customs and privileges of parliament be taken to be a branch of the common law, or a distinct and independent law, it is not true that the common law judges have no means of knowing what those customs and privileges are, nor have any right to decide upon their extent; for Lord *Hale* has shewn that the subject is cognizable by them; and Lord *Coke* himself has pointed out the sources from whence the knowledge of it is to be derived.

It appears from the authorities that the courts of law have always disregarded the resolution of either house, that such an act was a breach of privilege, when the same did not appear to them to be so by law. Thus in *Fitzharris*'s case (*a*), in 1681, who was impeached of high treason by the commons; when the lords had refused to proceed upon the impeachment, and had resolved that he should be proceeded with according to the course of the common law, the commons resolved that such refusal was illegal; and that for any inferior court (by which were meant the courts of *Westminster-hall*, or other than the high court of parliament) to proceed against *Fitzharris* or any other person lying under an impeachment in parliament for the same crimes of which he stood impeached, was a high breach of the privilege of parliament. But notwithstanding this, *Fitzharris* was tried (*b*) for high treason at the bar of this court, and convicted and exe-

Fitzharris's case, 1 *Com. Journ.* 26th *March*, 1681.

(*a*) 3 *St. Tr.* 224. 263. 4 *St. Tr.* 165. 8 *Cobbett's St. Tr.* 238.

(*b*) This was on the 9th of *June* 1681, after the dissolution of the parliament, which was on the 28th of *March* in the same year.

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cuted; a plea which he put in to the jurisdiction of the court, that an impeachment was pending against him, having been first overruled after long argument, and the defendant ordered to answer over. The opinion of Lord *Coke*, when speaker of the house of commons, (which is to be found in *D'Ewes*'s Journal, 482. (*a*), in the case of Mr. *Fitzherbert*, in the 35th of *Eliz.*, is material with reference to the writ of privilege. The questions declared by the committee were these two, whether Mr. *Fitzharris* were a member of the house; and if he were, whether he were to have the privilege. "It hath been my manner ever since my first practice to observe strange learning, especially such as appertaineth to the law; as in this of the privilege of this house; therefore I will inform what we have learned. First, this writ of privilege must go from the body of this house, made by me, and I to send it into the chancery, and the lord keeper is to direct it. Now before we make such a writ, let us know whether by law we may make it, or whether it will be good for the cause or no. For my own part, my hand shall not sign it, unless my heart may assent unto it. And though we make such a writ, if it be not warrantable by law and the proceeding of this house, the lord keeper will and must refuse it. No man shall stand more for the privilege of this house than I will; and what is the privilege of this house is meet should be observed." This shews the opinion of Lord *Coke*, that it was not the mere resolution of the house, that the writ should issue, which made it legal and binding; but the lord keeper, (paying indeed all due deference and respect to that reso-

Fitzherbert's case, 35 *Eliz.*

(*a*) This was quoted from a note of Mr. *Hargrave*, upon the judgment delivered by Lord C. J. *Bridgeman*, in *Benyon* v. *Evelyn*, *Tr.* 14 *Car.* 2. C. B. *Roll.* 2558., which was taken from a MS. in the progress of printing, but not then published, p. 14. of the print.

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lution,) was ſtill to conſider whether the party were legally entitled to the writ in the particular inſtance; and was bound to refuſe it, if in his judgment he were not ſo entitled. From whence it follows, that in no caſe can this court be bound by a mere reſolution of either houſe of parliament, if it appear that ſuch reſolution is not ſanctioned by law. This doctrine is alſo agreeable to an earlier deciſion of the Lord Chancellor in 1584 (*a*). A motion was made in the houſe of commons, touching the opinion of the houſe for privileges in caſe of a ſubpœna out of chancery ſerved upon *Richard Cook*, a member; and it was ordered that certain other members, attended by the ſerjeant of the houſe, ſhould in the name of the houſe repair preſently to the court of chancery, and there ſignify to the lord chancellor and the maſter of the rolls, that by the ancient liberties of the houſe the members were privileged from being ſerved with ſubpœnas; and not only to require the diſcharge of Mr. *Cook*'s appearance before the court on the ſaid ſubpœna, but alſo to deſire that in future the Lord Chancellor and the maſter of the rolls would allow the like privilege for other members to be ſignified under the Speaker's hand. But the anſwer returned to the houſe by the deputed members from the Lord Chancellor was, "that he thought the houſe had no ſuch liberty of privilege by ſubpœnas as they pretended: neither would he allow of any precedents of the houſe committed unto them, formerly uſed in that behalf, unleſs the houſe would alſo prove the ſame to have been likewiſe thereupon allowed, and ratified alſo by the precedents in chancery." It appears therefore that the Lord Chancellor acted in that caſe in the ſame

Cook's caſe, 1584.

(*a*) Cited from 1 *Hatſell*, 96.

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way which Lord Coke afterwards said that the lord keeper must do in case the writ of privilege was sent to him to pass the great seal, in a case where he thought by law that the party was not entitled to it. The mistake which Lord Coke fell into in supposing (*a*) that the judges could not [illegible] opinion respecting matters in parliament, arose from his view of *Thorpe*'s case; precedents of cases of privilege in parliament being in his time difficult to be gotten at, and very little known: but since then the laborious Mr. *Prynn* has much enlarged the collection, and it will appear from thence that the judges have declared their opinions on such privileges not only in their own courts, but even in parliament itself. Some of these are previous to *Thorpe*'s case. The first is the case of the Prior of *Malton*, 10 *Ed.* 2. (*b*), which was an original writ of attachment returnable in this court, reciting the privilege both of the prelates, earls, and barons, et alios, tam clericos quam laicos, in coming to, continuing at, and returning from parliament, to be protected from all grievances, &c. Such was the privilege of parliament considered to be at that time. It appears to have been an action brought in this court for a trespass and breach of privilege also, in which the plaintiff complained of the defendants for distraining him by his horses and harness at *York* when returning from the parliament at *Lincoln*. The process was executed, and the defendants were attached, but no judgment upon it has been found; so that it does not appear what was the final result of the case: but at least it establishes the fact, that so early as at that period an action was brought in this court for that which was complained of as a breach of privilege of parliament,

Prior of Malton's case, 10 Ed. 2.

(*a*) In 4 *Inst.* 15.

(*b*) *Prynne's Animadversions on 4 Institute*, p. 20. and 1 *Hatsell's Prec.* 12.

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as well as a trefpafs; and the defendants, who might have had a good caufe for diftraining, except fo far as refpected the breach of privilege, were put to anfwer both. It is alfo to be obferved, that the privilege was claimed as a joint privilege appertaining to the whole parliament, peers as well as commons. This view of the nature of parliamentary privilege will furnifh an anfwer to an objection fometimes urged againft the trial in an action of any matter of privilege claimed by the houfe of commons, that their privileges may be endangered by being fubmitted in the dernier refort to the judgment of the houfe of lords, or rather to the king in parliament, upon a writ of error. For it appears from this and fubfequent cafes that it is not the privilege of the one or the other houfe merely, as oppofed to or contradiftinguifhed from each other; but if the privilege in queftion exift at all, it is the joint privilege of the whole parliament: and the commons cannot be prejudiced by the legality of it being firft queftioned in this court, and afterwards before the king in parliament upon a writ of error, though the lords would have to give the judgment upon it, inafmuch as thefe have a joint intereft with the commons in fupporting every fuch claim, if it be founded in law; and they cannot negative the claim of the commons, without deciding at the fame time againft their own privilege. Lord *Hale* (*a*), however, in the laft chapter of his treatife on the jurifdiction of the lords' houfe of parliament, does not confider even their judgment as irremediable, though no perfon can appeal further as a matter of right; for there are many inftances in which the whole parliament have interfered by paffing an act to correct or reverfe a judgment of the houfe of lords; and in that way the

(*a*) P. 207, 8.

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commons themselves might, by the weight and influence of the means they possess, ultimately assert their own right, if upon a full investigation of the matter by the whole parliament, it should be found that any error had crept into such a judgment, or that the privilege claimed was such as ought in future to exist. An instance occurs of a statutable allowance of privilege in the 11 *Ric.* 2., which is not printed in the statute-book, but in the rolls of parliament (*a*). " The lords spiritual and temporal claim as their liberty and franchise, that the great matters moved in parliament touching peers shall be adjudged by the course of parliament, and not by the civil law, nor by the common law of the land used in more low courts. The king allows it in full parliament." Now considering this as extended pari ratione to the commons, though the peers only are mentioned; yet it is limited to matters done *in parliament*, and extends not to matters done *out* of it. It includes freedom of debate, and that members shall not be questioned for their conduct in parliament. Yet even in such matters the peers did not proceed as upon a resolution of their own, that they had such a privilege, but they claimed it as belonging to them to be exercised in parliament: and in full parliament it was allowed to them.

St. 11 *R.* 2.

Larke's case, 8 *H.* 6.

The next is *Larke*'s case (*b*), 8 *H.* 6., who, being a servant of *Wm. Mildred*, a member of the house, was taken in execution during the parliament, on a judgment in trespass given in C. B. before the day of summoning the parliament, as well for the king's fine for the trespass vi et armis, as for the damages recovered. Upon which a bill was brought into the house in the form of a petition from the commons for parliamentary remedy, in which

(*a*) 3 vol. 244. (*b*) 1 *Hatsell*, 18.

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they assert their claims, and declare their opinion, that they were privileged from all arrests during the parliament, except for treason, felony, or surety of the peace; and conclude by praying that in future it may be enacted into a law, that neither lords, nor knights, nor others, (considering it as a common privilege of the whole parliament and not merely of their own body,) or their servants, might be arrested or detained in prison during the time of parliament, except for treason, &c. There was an enactment in that case, by the consent of the plaintiff's counsel, for the discharge of *Larke* out of custody; he having been taken during the parliament, though upon a judgment given before: but there was a saving to the plaintiff of his execution after the end of the parliament, and for the king's fine. But the rest of the petition for a like general law in future was denied. That therefore is an instance in which the commons' house claimed, besides the special redress in the particular instance, a general privilege for their members, jointly indeed with the rest of the parliament; but they did not act upon this claim themselves, but submitted it to the rest of the parliament, as a matter of general concern. And though their petition was partly complied with, so far as affected the present discharge of the member arrested; yet even that was only done by consent of the plaintiff's counsel, and upon the terms, as it seems, of saving to the plaintiff in the suit his further execution after the parliament was up: for otherwise the defendant having been once taken in execution, the plaintiff's right would have been gone: and the general recognition by a law of the privilege claimed in the like cases in future was refused. It was a perilous act in a sheriff to discharge a person arrested, upon his bare assertion that he was a member of parliament, or even

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upon the sheriff's own knowledge of it, unless he also knew the extent of the privilege, and whether it covered the particular case; for the sheriff was liable for the debt if he wrongfully liberated his prisoner: and therefore the sheriff, who was sworn to obey the king's writ, was not bound to take notice that his prisoner was a member of parliament, if he had not his writ of privilege, which was to be the sheriff's protection for his discharge as against the plaintiff in the suit: and without such writ, it appears in one case, as if it would have been considered a breach of the sheriff's duty to discharge the prisoner upon his bare assertion: and during the sitting of parliament it might be considered as the party's own fault if he did not obtain his writ of privilege. With this accords what was said by Sir *Orlando Bridgeman* in the judgment of *Benyon Evelyn* (a). "But in case of a judgment against a privileged person, and he taken in execution thereon sedente parliamento, the law seems in former times to have been more doubtful. 8 *H.* 6. *Rot. Parl.* No. 57." (Then, after citing *Larke*'s case, he proceeds—) "Upon the petition of the commons, the king, by advice of the lords, but with consent of the plaintiff's counsel, enacts that the judgment shall stand in force; and that after the parliament ended the judges shall make out process of capias ad satisfaciendum et pro fine, as if he had never been imprisoned; and commissioners to be appointed by the Lord Chancellor to take him and deliver him to the warden of the *Fleet*." But where it was further prayed that none of the members a vos parlements desore avenniere, leur servants ou familiers, de ne soient ascunement arrestes ne en prison deteynes durant le temps de vos parlements, s'il ne soit pour treason, felony, ou surety

(a) Cited from the MS. before referred to, p. 18. n. a.

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de peace; the anfwer is, roy fe avifera. There was a fpecial act of parliament for a new execution and by a new way againft *Larke*; but the king refufed to make a general law in it." 1811.

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Then came *Thorpe*'s cafe (*a*), 31 & 32 *H.* 6., *Rot. Parl.* No. 25, 26, 27, 28, & 29. It would feem from the 4th Regifter, 683. mentioned by Mr. *Hatfell*, that parliament was only under an adjournment when *Thorpe* was profecuted to judgment and taken in execution; but it appears by the rolls of parliament (*b*), that it was then prorogued (*c*). It was an action of trefpafs for taking goods, brought in the court of excheqùer at the fuit of the Duke of *York* againft the Speaker of the houfe of commons, in which, during the prorogation, judgment was recovered by the Duke for 1000*l.* and 10*l.* cofts; and *Thorpe* was taken in execution for the amount, and committed to the *Fleet*, as well for the fine due to the king, as for the damages adjudged to the plaintiff. Afterwards, upon the meeting of parliament on the 15th of *February*, the commons petitioned the king and the lords, that they might enjoy all fuch liberties and privileges as they had been accuftomed and of ancient time ufed for coming to the parliament, and going, and returning; and then they require that *Thomas Thorpe* their Speaker, and *W. Royle*, members of the faid parliament, then being

Thorpe's cafe, 31 & 32 *H.* 6.

(*a*) 1 *Hatfell*, 29. and 5 vol. of Rolls of Parliament, 227 to 239. 4 *Inft.* 15.

(*b*) Mr. *Hatfell* alfo refers to the 2d vol. of Parliamentary Hiftory, 270, as the more probable account, to fhew that parliament was under prorogation at the time.

(*c*) On the 6th of *March*, 31 *H.* 6. the parliament met at *Reading*; on the 28th of *March* it was prorogued to the 25th of *April*, and then held at *Weftminfter* till the 2d of *July*, when it was again prorogued. It was afterwards held at *Reading* on the 7th of *November*, and then prorogued till the 11th of *February*, at *Weftminfter*, and then adjourned to the 14th of the fame month.

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in prifon, may have their liberty; this being declared to be a privilege of parliament. The caufe of the judgment and commitment was thereupon declared to the lords by the counfel for the Duke of *York*; and thereupon it was prayed on behalf of the Duke, that the lords, confidering that the trefpafs was committed by *Thorpe* after the beginning of the then parliament, and that the action was commenced, "and by procefs of law judgment thereupon given againft the faid *Thomas Thorpe* in time of vacation of the Parliament, and not in parliament time;" and that if he fhould be releafed by privilege of parliament before the Duke was fatisfied of his damages and cofts, the Duke would be without remedy in that behalf; therefore that *Thorpe* fhould according to law be kept in ward till the damages and cofts were fatisfied. But the lords; "not intending (as it is ftated) to impeach or hurt the liberties and privileges of them that were come for the commune of this land to this prefent parliament, but equally after the courfe of law to minifter juftice, and to have knowledge what the law will wey in that behalf; opened and declared to the juftices the premifes, and afked of them, *whether the faid* Thomas *ought to be delivered from prifon by force and virtue of the privilege of parliament, or not?* To the which queftion the chief juftices, in the name of all the juftices, after deliberation had among them, faid that they ought not to anfwer that queftion, for it hath not been ufed aforetime that the juftices fhould in anywife determine the privilege of the high court of parliament." Now to paufe on this firft part of their anfwer; the lords, who muft be taken to have known what the privileges and courfe of parliament were, conceived that they had a right to apply to the judges for their advice upon the matter of law. The judges however fay that they were

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were not to *determine the privilege of the high court of parliament.* The queſtion it is to be obſerved was put to them *in parliament*: and *in parliament* the judges were not to determine any thing, having no voices there: they were only, when called upon, to adviſe the lords in matters of law; and the lords, who were ſitting in that caſe as the magnum concilium regis, were to *determine* the point. Lord *Hale* (*a*), ſpeaking of the different councils of the king, mentions the concilium privatum, the concilium ordinarium, and the concilium magnum, both in and out of parliament. That of the concilium ordinarium, the privy council and great officers of ſtate, whether peers or not, and the judges were members. That the concilium magnum was a council both in and out of parliament; that is, whether parliament were ſitting or not; and the concilium ordinarium was a part of that council when they were ſitting in parliament. In early times much buſineſs was done in the houſe of lords, ſitting not as a part of the magnum concilium: in that caſe the judges had voices, and might aſſiſt in the determination as well as any of the lords of the council. At the time when the queſtion was put to the judges in *Thorpe*'s caſe, concerning the privilege of parliament, the lords were ſitting as part of the magnum concilium *in parliament*, where the judges had no deliberative voice; and that furniſhes the true ſolution of the anſwer given by them on that occaſion. For they ſaid "it was not for them to determine what might be done by parliament, which is ſo high and mighty in its nature that it may make law, and that that is law it may make no law: and the determination and knowledge of that privilege belongeth to the lords of the parliament, and not to the

(*a*) *Juriſdiction of the Lords' Houſe of Parliament*, ch. 2. p. 5, &c.

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justices." Undoubtedly the *determination* of it did belong to parliament, by which must be understood the whole parliament, and not any one branch of it. But the judges proceeded to declare how they should proceed in their own courts; "in such cases as writs of supersedeas of privilege of parliament be brought and delivered, the said chief justice said that there be many and divers supersedes of privilege of parliament brought into the courts; but there is no general supersedes brought to surcess of all processes, &c." It appears from thence, and from the 4th part of *Prynn's Reg.* 811. that *Thorpe* had only a general supersedeas: and so likewise in *Hodges* v. *Moor* (a), where a claim of privilege was, upon a letter brought by the defendant from the Speaker to the court of K. B., disallowed by the whole court; the judges say that the defendant ought to have brought a writ of privilege; and that when *Thorpe* was Speaker, he having only a general supersedeas for all actions, it was held ill. So that the judges, stating in *Thorpe*'s case what they do in their own courts upon writs of supersedeas, distinguish between those that are lawful or otherwise, and declare that a general writ of supersedeas, such as *Thorpe* appears to have had, would not avail, but that he ought to have had a particular writ of supersedeas for each action; the privilege of parliament being for the person and not for the proceeding. These considerations will serve to explain the proceeding in that case, and the judgment eventually given on it by the parliament. "For (say the judges) if there should be a general supersedeas brought to surcease all processes, it should seem that this high court of parliament, that ministreth all justice and equity, should lett the process of the common law, and so it should put

(a) *Noy*, 83.

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the party complaining without remedy, for so much as actions at common law be not determined in this high court of parliament. And if any person that is a member of this high court of parliament be arrested in such cases as be not for treason, or felony, or surety of the peace, or for a condemnation had before the parliament, (that is before the time of holding the parliament, not in parliament,) it is used that all such persons be released of such arrests, and make an attorney (*a*); so that they have their freedom and liberty freely to attend upon the parliament." All this serves to shew what the judges meant by saying they were not to *determine* the privilege of the high court of parliament before which they were then called to advise. [Lord *Ellenborough* C. J. Surely the word *determine* was not there meant to be used by them in the sense of *adjudge*; but they meant to say no more than this; you, the lords' house, ask our opinion upon a question concerning privilege of parliament before you; but we are not to determine that question; that is, we are not to give you any determinate purpose upon that subject. The question was not addressed to them as to persons who were to determine or adjudge upon it, but as advisers to the lords on the law. They say in effect,

(*a*) *i. e* " make an attorney to answer the action; which, says Sir *O. Bridgeman*, in *Benyon* v. *Evelyn*, (from Mr. *Hargrave*'s MS. before cited,) shews that the foundation, the bringing of the action, was still good, though the superstructure, the proceeding by arrest, was void. 31 *H.* 6. *Rot. Parl.* No. 26, 27. In *Thorpe*'s case, the Chief Justice, in the name of all the Judges, declares to the Lords the course of proceeding in the courts of *Westminster* upon supersedeas of privilege; that if a member of parliament be arrested in such cases as be not for treason, felony, or breach of the peace, or for a condemnation had before a parliament, it is used that all such persons should be released of all such arrests, and make an attorney; so that they may have the freedom and liberty freely to attend the parliament. This is so pregnant a proof of the course of practice of those times, being the declaration of all the judges, that I shall not need to make further proof before that time."

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it is not a proper fubject for us to enter into; it properly belongs to yourfelves; and therefore it is not for us to advife you upon it.] Sir *O. Bridgeman* (*a*) feems to have drawn the fame conclufion from the anfwer of the judges in that cafe as is now fubmitted to the Court; and the lords themfelves decided in the cafe before them according to the opinion of the judges; fo that they could not have confidered the anfwer of the judges as a declaration that they knew nothing about the matter, and therefore could offer no advice to their lordfhips. And in the conclufion of the record it is faid; "after which anfwer and declaration it was thoroughly agreed, affented, and concluded, by the lords fpiritual and temporal, that the faid *Thomas (Thorpe) according to the law* fhould remain ftill in prifon for the caufes above-faid; the privilege of the parliament, or that the faid *Thomas* was Speaker of the parliament, notwithftanding." [Ld. *Ellenborough* C. J. I do not mean to touch upon the obfervations arifing out of *Thorpe*'s cafe, which are many and important ones; but it appears to me that the fair import of the judges' anfwer to the queftion put to them is this: We cannot determine that which is a queftion for your own confideration refpecting your own privileges, but we will tell you what is the rule upon which we act in our courts. And then the lords adopt the rule of law as it prevailed in the courts of *Weftminfter*.] The lords proceeded further in that cafe to declare, "that the premifes fhould be opened and declared to them that were comen for the commune of this land, and that they fhould be charged and commanded in the king's name, that they with all goodly hafte and fpeed proceed to the election of another Speaker." And then the record concludes,

(*a*) Ut fupra.

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"The which premifes, forafmuch as they were matters in law, by the commandment of the lords, were opened and declared to the commons by the mouth of *Walter Moyle*, one of the king's ferjeants at law." Now it would indeed be extraordinary, if the judges could know nothing of the privileges of parliament, and could not even give an anfwer of advice refpecting them, that the lords fhould order one of the king's ferjeants to go and expound their refolution to the commons becaufe it contained *matters in law*. The matter was accordingly opened and declared to the commons by the king's ferjeant at law, in the prefence of the Bifhop of *Ely*, accompanied by other lords; and the bifhop then commanded them in the king's name to elect another Speaker; which they did. The fum of the whole cafe is this: the commons, conceiving their privilege to be invaded by the proceedings had againft their Speaker, and his commitment in execution of the judgment recovered againft him, do not act of themfelves upon their own declaration that they had fuch a privilege, but ftate it as a matter of general concern to the parliament at its opening, by way of claim indeed and as a matter of right, together with other privileges, in order that it may be acknowledged and ratified, and that no perfon may be ignorant of it. The lords call upon the judges for their opinion upon the queftion, confidering it as a matter of law. The judges, waving the determination of the cafe as a matter touching the privilege of the high court of parliament, in which they had no deliberative voice, advife the lords how they (the judges) would act upon it in their own courts: and the lords, adopting the rule of the courts of law, difallow the privilege claimed, be-

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cause *Thorpe*, the imprisoned member, defendant in the suit, had only a general supersedeas, and not a particular supersedeas in that suit; and because the condemnation was before the parliament began; being during a prorogation. The commons acquiesce in this decision, and chuse another Speaker. Sir *O. Bridgeman* thus comments upon *Thorpe*'s case in giving his judgment in *Benyon* v. *Evelyn* (*a*). The principal question there being whether it were a breach of privilege to sue out and continue an original against a member of the commons' house of parliament during the sitting of parliament; which was decided in the negative: he says, "I should have been glad not to have had occasion to have delivered my opinion in this point for two reasons; first, because it is a tender thing for an inferior court to judge of the privileges of a superior court: and 4 *Inst.* 50. saith, that the judges are assistants to the lords to inform them of the common law; but it doth not belong to them (*b*) to judge of any law, custom, or privilege of parliament; and cites for it *Thorpe*'s case, 31 *H.* 6. *Rot. Parl.* No. 26, and some other cases; *which cases only extend where the privilege of parliament comes in debate in the house of peers.* The judges are not *to determine there* what the privilege of parliament is in such cases; for the conusance thereof belongs to the lords of the parliament, and not to the judges: and yet even *there*, the judges deliver their opinions to the lords, as assistants, what the course of common law was in such cases; according to which opinions the lords gave their judgment against privilege in that case; that *Thorpe*, being

(*a*) From Mr. *Hargrave*'s MS. p. 6. &c.

(*b*) The learned editor of that judgment remarks in a note the omission of a qualification added here by Lord *Coke*, viz. "as hath been said," &c.

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condemned in trefpafs in the interval of parliament, and in the *Fleet* pro fine regis, fhould remain in execution there. But *out* of parliament, *where, upon an action at common law, a queftion concerning privileges of parliament arifes, nothing hath been more frequent than for the judges of the common law to deliver their opinions concerning it, and confequently to give their judgments* (*a*)." [*Bayley* J. They muft know the extent of their own jurifdiction, and in what cafes it is taken away. But it does not follow that the common law courts are bound to take conufance of the particular way in which the privileges of parliament are to be exercifed in all inftances. The cafes alluded to are thofe where an action being depending in this or fome other court, it has been attempted to ftop the proceedings upon the ground of an alleged breach of privilege: it therefore became neceffary for the Court to take notice of the extent of their own jurifdiction, and to fee whether a fufficient foundation were laid for ftaying the action.] It will appear upon the confideration of all the cafes to what extent the courts of law have gone in tak-

(*a*) Sir *O. Bridgeman* continues, and concludes this part of his judgment with faying, "The king himfelf daily permits his privileges and prerogatives to be determined between him and his fubjects in the courts of *Weftminfter* by the common law. And when in a common action *the privilege of parliament doth come to be part of the plea or juftification, it is of neceffity that the privilege, whether there be fuch, and what the extent of it is, come alfo into confideration* For as in the regifter (*Regift. Brev.* 58.) it is faid of the ecclefiaftical court, which is inferior to the common law, if a common law point come in queftion there, non eft confonum rationi quod cognitio acceffarii in causâ chriftianitatis impediat, ubi cognitio caufæ principalis ad forum ecclefiafticum nofcitur pertinere; fo I may fay here, the privilege of parliament coming in incidentally as part of the cafe, as a confequent muft in this particular cafe be alfo debated here. And fo it was in *Trewyniard*'s cafe, 36 *H.* 8. *Dy*. 60. in an action of debt againft a fheriff upon an efcape of a member of parliament taken in execution, and delivered by privilege of parliament. And in *River*'s cafe, 12 *Ed.* 4. and in other cafes, fome of which I fhall have occafion to cite anon at large."

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ing conusance of particular claims of privileges. It was the more necessary to enter at large into the examination of *Thorpe*'s case, because that has been made the foundation of the notion that the judges in the courts of common law could not take conusance of the privileges of parliament, which will appear to be an erroneous conclusion.

Clerke's case, 39 *H.* 6.

Clerke's case in the 39 *H.* 6. (*a*) is the next upon the subject. That was a petition to the king in parliament by the commons, stating that *Clerke*, who was burgess for *Chippenham*, after coming to and during the sitting of parliament was arrested and imprisoned for certain fines due to the king, which had accrued in an action of trespass brought by *Robert Basset* against *Clerke*, in which he was condemned, and also in another action against him by *John Payne* for maintenance, in which also he was convicted. He was outlawed at the suit of one of the parties, and was taken upon a capias utlagatum, and finally committed to the *Fleet*, where he was retained by the other party; and was in custody at the time of the petition to answer the condemnation money to the respective parties, and the fines due to the king. The prayer to the king and lords was to order that the chancellor have power to direct writs to the warden to discharge *Clerke*, in order that he might attend the parliament; and that neither the chancellor, nor the warden of the *Fleet*, nor any other be endangered by the dismissal; saving however the execution of the king, and of the respective plaintiffs in the suits, after the dissolution of the parliament, notwithstanding the arrest and discharge, as if

(*a*) 5 vol. of *Rolls of Parliament*, 374.; and 1 *Hatsell*, 34.

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he had not been arrefted; and faving to the commons their whole privilege in tam amplo modo as if an act had not been made. That petition was granted by the king and the lords, and fo became an act of parliament. There again the commons had come to a refolution that the arreft of *Clerke* was a breach of their privilege; yet they did not act upon that of themfelves, but prayed an act of parliament, which was acceded to by the reft of the legiflature, to difcharge him during the parliament; indemnifying the chancellor, and faving the rights of the king and of the creditors after the parliament. From whence it fhould feem that the arreft was not confidered to be wholly illegal; the condemnation being prior to the parliament; but the taking of him being in the time of parliament; he not having his writ of privilege; becaufe they fave the rights of the king and the creditors after the end of the parliament, and fubject him then to be taken in like manner as if he had never been fo before, from which otherwife he would have been freed.

Donne v. *Walfh*, *M.* 12 *Ed.* 4. *Rot.* 20.

The next is the cafe of *Donne* v. *Walfh*, which was in the Exchequer of Pleas, in 12 *Ed.* 4. (*a*) It was a bill of debt on bond, to which the defendant, a fervant of the Earl of *Effex*, pleaded his writ of privilege: and there, though the queftion arofe concerning a breach of privilege of the lords' houfe only, yet the writ recites it as an entire and joint privilege of the lords and commons, that none of them ought to be imprifoned or impleaded during the time of parliament: and then the defendant pleads, that he on fuch a day and ever fince (covering the time of the writ) was the menial fervant to the Earl of *Effex*, and came with him to parliament, &c. The plaintiff

(*a*) 4 *Prynne's Parl. Writs*, 743. (752.)

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replied that there was no fuch cuftom of parliament as pleaded by the defendant; which was in fact a demurrer, and is fo treated by Mr. *Atkyns* in his treatife of the power of parliament (*a*); and judgment was thereupon given by the Barons of the Exchequer, with the advice of all the other judges; allowing that there was a cuftom of parliament that the members of either houfe ought not to be taken or arrefted during the time of parliament; but denying the cuftom to be that they ought not to be impleaded (*b*). That is a direct authority in point: it is a decifion of all the judges on a queftion of privilege brought in judgment before them; and fo far as they thought the privilege founded in law, they allowed it; but beyond that, they difallowed it.

Rivers v. *Cofins*, 12 Ed 4.

There is alfo a fimilar decifion of the court of Exchequer in *Rivers* v. *Cofins* (*c*), in the fame year; in commenting on which Sir *Orlando Bridgeman* (in *Benyon* v. *Evelyn*) fays, "This precedent, being by the advice of all the judges of *England*, ought to have its due refpect; and it contains feveral things worthy of obfervation; amongft others, that there is no fuch cuftom or privilege, that a member of parliament cannot be *impleaded* during the parliament: and the perfon who claimed the privilege was put to anfwer during the parliament, and judgment was given againft him." He adds further, "the refolution of all the judges, I cannot fay was fatisfactory to all the members of the commons' houfe, who claimed greater privileges both as to the difcharge of members and their fervants taken in execution, than was allowed either by the king and

(*a*) P. 42.

(*b*) In the recital of this cafe in the judgment of *Benyon* v. *Evelyn*, it is added that "judgment was thereupon given againft the privilege."

(*c*) 4 *Prynne*, 757 to 763., and the fame record is recited at length in Sir *O. Bridgeman's* judgment, before cited, in *Benyon* v. *Evelyn*, p. 29.

and lords in parliament, or in *Westminster-hall* by the judges; as appears by the saving in the clause of *Wm. Hyde*'s case, 14 *Ed.* 4. No. 55., and also by their claims in the case of *John Atwell*, burgess of *Exeter*, 17 *Ed.* 4. *Rot. Parl.* No. 35., both being after this resolution of the judges in *Rivers*'s case." 1811. BURDETT *against* ABBOT.

All these authorities shew that Lord *Coke* was mistaken in the conclusion which he drew in 4 *Inst.* 15. from *Thorpe*'s case. "The truth," says Sir *O. Bridgeman* (*a*), "is, that Lord *Coke*'s treatise of the jurisdiction of parliament is a posthumous work; and though I shall attribute as much to his learning in the law as to any sages in the law whatsoever, yet there not being that freedom in former times of having copies of the records at large as hath been since, when he comes to cite them he is guided by abstracts, which occasions miserable mistakes, and by the Modus tenendi Parliamentum, which, as to the time of making it, was most certainly a counterfeit piece. So that there are a multitude of errors in his chapter concerning parliaments, and in particular both those records (*b*) are grossly mistaken."

Hyde's case referred to by Sir *O. Bridgeman* is in effect the same as *Clerke*'s case before mentioned (*c*). The other case mentioned by him, of *Atwell*, 17 *Ed.* 4. (*d*), was that of a petition from the commons, reciting as before, that "from time out of mind the knights, citizens and burgesses of parliament, amongst other liberties and franchises, have had and used the privilege that any of them should not be *impleaded* in any action personal, nor

Hyde's case, *supra*.

Atwell's case, 17 *Ed* 4. *Rot. Parl.* No. 35.

(*a*) P. 34. of the judgment in *Benyon* v. *Evelyn*.

(*b*) The cases referred to by Lord *Coke* in 4 *Inst.* 24. are *Bogo de Clare*'s case, 18 *Ed.* 1., and *John de Thoresby*'s case, 10 *Ed.* 3.

(*c*) Ante, p. 34.

(*d*) 5 vol. *Rolls of Parl.* 131.; and *Hatsell*, 48.

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be attached by their perfon or goods in their coming to any fuch parliament, there abiding, nor from thence to their proper home reforting; which liberties and franchifes the king at the commencement of this parliament gracioufly hath ratified and confirmed." Then it fets forth that *John Atwell*, citizen for *Exeter*, coming to the parliament, and continually attending upon the fame fince its commencement and during its continuance, was condemned by default of anfwering to eight feigned informations in the Exchequer preferred againft him by *John Taylor*, in 160*l.*; the faid *John Atwell* daily attending the parliament, and not having knowledge of the fame condemnations. That writs of fieri facias and capias ad fatisfaciendum had iffued againft him, on which he was apprehenfive of being taken; fo that he could not freely depart from this prefent parliament to his own home for doubt of his body and goods being put in execution, contrary to the privilege due to the members of parliament. Upon this prayer of the commons, the king by advice of the lords, orders (and thereby it is enacted) that the faid writs of execution fhould not be executory or hurtful to him, his body or goods, returning from the parliament; and that the Chief Baron of the Exchequer (the judgments being in that court) fhall have power to grant without denyer writs of fuperfedeas to furceafe all manner of executions in that behalf to be made. "Saving always to the aforefaid *John Taylor* his aforefaid judgments and executions, and every of them, to be had and fued at his pleafure againft the faid *John Atwell* at every time after the end of this prefent parliament, this prefent ordinance notwithftanding." There again the commons ftill claimed the cuftom not to be *impleaded* fedente parliamento, notwithftanding the decifion in *Donne* v. *Walfh*:

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and this claim, it is obferved by Sir O. *Bridgeman* (*a*), is negatived in effect by the faving claufe in the act, referving to *Taylor* his execution after the end of the parliament. He muft therefore have confidered that it was not a refolution of the commons' houfe only, which makes a privilege, unlefs it be either acknowledged by the law before, or ratified by the reft of the parliament, which would make it a law in future. In confequence of this it appears, that in the next claim of privilege of this defcription made by the commons, the claim of exemption from being *impleaded* during the parliament is omitted.

That was in the cafe of *Roo* v. *Sadcliffe* (*b*), 1 *H.* 7. where the privilege, which was claimed entire both for lords and commons, was confined to freedom from arreft or imprifonment. Up to that period the houfe of commons had never proceeded as for a breach of privilege upon their own authority: when it was a common cafe of privilege known to the law, a writ of privilege had iffued as a matter of courfe, by which it was inforced: when there was any doubt or difficulty in the matter, it was referred to the confideration of the whole parliament, and acted upon by them as a matter of common concern to both houfes; but it never was acted upon by the commons alone on their fingle refolution: they had never proceeded to deliver any perfon arrefted upon procefs out of cuftody

Roo v. *Sadcliffe*, 1 *H.* 7.

(*a*) His words immediately following the ftatement of the faving claufe are, " whereby it appears that the judgment of the king and lords in parliament agreed with the judge's refolutions, that the *impleading* a member of parliament during the parliament, without taking out execution, was not againft the privilege; for there is a faving of the judgment. From all which the inference is ftrong; the act of parliament did allow the foundation and proceeding and judgment againft *Atwell*, a member of parliament, during the parliament, though it difcharged the execution."

(*b*) *Roll of Parl.* 104. and 1 *Hatfell*, 51.

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by their own authority: on the contrary, they had at last abandoned their repeated claim of privilege to be exempt from being *impleaded* during the parliament, after it had been as often disallowed by the lords and the judges.

Ferrers's case, 34 *H.* 8.

The next in order is *Ferrers's* case, 34 *H.* 8.; the account of which is taken from *Holingshed* (*a*), who says that it having been a case of privilege, he had gotten as correct an account of it as he could from those whom he considered to be well acquainted with it: but it is quoted at length from thence by Sir *O. Bridgeman* in his judgment in *Benyon* v. *Evelyn* (*b*), and is in substance as follows. "During the sitting of parliament one *George Ferrers*, a servant of the king, being elected a burgess for *Plymouth*, in going to parliament was arrested in *London* by process out of K. B. at the suit of one *White*, for 200 marks, wherein he was late afore-condemned as a surety for the debt of one *Wheldon*: which arrest being signified to the commons' house, order was taken that the serjeant at arms should forthwith repair to the *Compter* in *Bread-street*, whither *Ferrers* was carried, and there demand his delivery. [This was the first instance where any such delivery had been demanded or made except by writ of supersedeas.] The serjeant went accordingly to the *Compter*, and declared to the clerks there what he had in command; but they and other officers of the city were so far from obeying the said command, that after many stout words they forcibly resisted the serjeant, and an affray ensued within the *Compter* gates between *Ferrers* and the officers; so that the serjeant was driven to

(*a*) 1 vol. 955.

(*b*) P. 19. Mr. *Hargrave* refers in the margin to *Crompt. Jurisdiction of Courts*, 8., to 36 *H.* 8. fo. 61., and to *Dy.* 275.

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defend himself with his mace, the crown of which was thereby broken, and his mace was stricken down. During this brawl the sheriffs of *London* came thither, to whom the serjeant complained of this injury, and required of them the delivery of the said burgess, as before. But they, taking part with their officers, made little account either of his complaint or of his message, rejecting the same contemptuously with much proud language: so that the serjeant was forced to return without the prisoner; and finding the speaker and all the knights and burgesses set in their places, declared to them the whole cause as it fell out; who took the same in so ill part, that they altogether (of whom there were not a few, as well of the king's privy council as also of his privy chamber,) would sit no longer without their burgess, but rose up wholly and repaired to the upper house, where the whole case was declared by the mouth of the speaker before Sir *Thomas Audley* Knt. then Lord Chancellor of *England*, and all the lords and judges there assembled, who judging the contempt to be very great, referred the punishment thereof to the order of the commons' house." The account then proceeds, that "The commons returned from the house of lords to their places, and upon new debate of the case took order that their serjeant should soon repair to the sheriffs of *London* and require delivery of the said burgess, without any writ or warrant had for the same, but only as before; albeit the Lord Chancellor offered then to grant a writ, which they of the commons' house refused; being of a clear opinion that all commandments and other acts proceeding from the nether house were to be done and executed by their serjeant without writ, only by shew of his mace, which was his warrant." Before that time the writ of privilege had

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had always iſſued, which vouched the authority from whence the protection proceeded; but upon that occaſion as the officer of the commons had been ſent immediately from their own houſe with the inſignia of his office, they deemed that to be a ſufficient authority to the ſheriff to deliver up the impriſoned member. "But before the ſerjeant's return into *London*, the ſheriffs, having intelligence how heinouſly the matter was taken, became ſomewhat more mild; ſo as upon the ſaid ſecond demand they delivered the priſoner without any denial. But the ſerjeant having then further in command from thoſe of the nether houſe, charged the ſaid ſheriffs to appear perſonally on the morrow by 8 of the clock before the ſpeaker in the nether houſe, and to bring thither the clerks of the *Compter* and ſuch other of their officers as were parties to the ſaid affray; and in like manner to take into his cuſtody the ſaid *White*, which wittingly procured the ſaid arreſt in contempt of the privilege of the parliament. Which commandment being done by the ſerjeant accordingly, on the morrow the two ſheriffs, with one of the clerks of the *Compter* who was the chief occaſion of the ſaid affray, together with the ſaid *White*, appeared in the commons' houſe; where the ſpeaker charging them with their contempt and miſdemeanor aforeſaid, they were compelled to make an immediate anſwer without being admitted to any counſel; albeit Sir *Robert Cholmley*, then recorder of *London*, and other the counſel of the city then preſent, offered to ſpeak in the cauſe, who were all put to ſilence, and none ſuffered to ſpeak but the parties themſelves. Whereupon in concluſion the ſame ſheriffs and *White* were committed to the Tower of *London*; and the ſaid clerk, who was the occaſion of the fray, and the officer of *London* who did the arreſt,

reſt, called *Taylor*, with four other officers, to *Newgate*, where they remained from the 28th to the 30th of *March*; and then they were delivered, not without humble ſuit made by the mayor of *London* and other their friends. And foraſmuch as the ſaid *Ferrers*, being in execution upon a condemnation of debt, and ſet at large by privilege of parliament, was not by law to be brought again into execution, and ſo the party without remedy for his debt, as well againſt him as his principal debtor; after long debate of the ſame for nine or ten days together, they at laſt reſolved on an act of parliament to be made, and to renew the execution of the ſaid debt againſt *Wheldon* the principal debtor, and to diſcharge the ſaid *Ferrers*." It is to be recollected that the condemnation in this caſe had been before the parliament, and that *Ferrers* was taken as he was coming to the parliament; and it was before that time a conteſted point, whether a member coming to the parliament could be arreſted upon a condemnation had before. But there were other ingredients in the caſe, which probably entered materially into the deciſion in the reſult, namely the indignity and violence offered by the ſheriffs and their officers to the ſerjeant at mace bearing the enſign of his official authority, and alſo the ſituation of *Ferrers* himſelf as an immediate ſervant of the king. The lord chancellor, it is ſaid, and all the lords and judges there aſſembled, judged the contempt to be very great upon the declaration to them of the whole caſe; yet in *Moore's Rep.* 57. it is reported to have been ſaid by *Dyer* "que ſi home ſoit condemne, en debt ou treſpaſs, et eſt eſſien un des burgeſſes ou chivalers de parliament, and puis ſoit priſe en execution, il ne poit avoir le priviledge del parliament: et iſſent fuit tenus per le ſages del ley en le caſe d'un *Ferrers* en temps le

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roy *H.* 8. et comment que le priviledge a ceo temps fuit a luy allow, ceo fuit minus juste." And this case is thus mentioned by Sir *Robert Atkins*, one of the judges of C. B., in his argument in *Barnardiston* v. *Scame* (*a*). "10 *Eliz. Dy.* 275. there is an action brought against the keeper for letting a burgess of parliament go at large by writ de privilegio parliamenti, who was in execution. The Lord *Dyer* says nothing there what became of it; but *Moor* 57. reports that it was held by *Dyer*, that if one condemned in debt or trespass be chosen to the parliament, and after taken in execution, he shall not have his privilege of parliament: and, as he says, it was so held by the sages of the law in the case of *Ferrers*; and that though his privilege was indeed allowed, yet, (as they held) it was minus justè. Which case of *Ferrers* was the same here mentioned before to be in *Dyer*, 275. as appears by Mr. *Crompton* in his Jurisdiction of Courts, 8. *b*. So that some things relating to the parliament the courts of *Westminster* must determine, and the judges cannot avoid it if they will do justice." It seems on the whole, that the complaint of the commons was not so much of the original arrest being a breach of privilege as of the violent and contemptuous manner in which the sheriffs and their officers treated the serjeant at arms when sent by the house to demand their member; for they saved the plaintiff's execution against *Wheldon* the principal debtor, who, upon the supposition that the taking of *Ferrers* the surety in execution was lawful, would otherwise have been discharged; although *White* the plaintiff had willingly procured the caption of *Ferrers* as he was coming to the parliament. Even with respect to *Ferrers* himself, though he was ultimately dis-

(*a*) 7 *St. Tr.* 437.

charged

charged by the act, there appears to have been some previous doubt; for it is said (*a*) that "before this came to pass the commons' house were divided upon the question, but in conclusion the act passed for *Ferrers, who won by 14 voices.*" It would certainly have been dangerous for the sheriffs to have discharged their prisoner upon their own responsibility, on the mere verbal order of the serjeant bearing his mace; for if that had not been deemed a good authority at law for the discharge, the sheriffs would have made themselves liable for the debt. There was another ingredient too in the case, that *Ferrers* was a servant of the king; who, being advised of this proceeding, called before him the lord chancellor and the judges, together with the speaker of the parliament, and others the greatest persons of the nether house, before whom he claimed the privilege for all his servants attending there upon him: so that, said his majesty, if *Ferrers* had been no burgess, but only his servant, yet in respect thereof he was to have the privilege as well as any other: being, as he said, informed that the members claimed the privilege for their servants during the parliament. But after reproving the conduct of the plaintiff in the action, his majesty commended the equity of the commons in restoring to the plaintiff his remedy against the principal which he had lost by law. And afterwards Sir *Edward Montague*, the chief justice, confirmed all that the king had said respecting the privilege; which was assented to by the rest. So that it appears that the allowance of the privilege in that case was as well in respect of the claim of the king for his servants, as of the claim of the house for its members. In the sequel however the act did not pass the upper house, as the parliament was dissolved before the lords

(*a*) Vide the judgment in the case of *Benyon* v. *Evelyn*.

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had time to confider it. Sir *O. Bridgeman* (*a*), in fpeaking of that cafe, having before ftated that it had been confidered a doubtful matter whether the party there were entitled to privilege or not, fays, that " this cafe doth not only determine the law for the privilege againft the execution, but alfo that the party ought to be difcharged without writ when the ferjeant at arms came for him." But *Pafch.* 6 *Eliz.* in *Moore's Rep.* 57.; (and I have feen the fame in other good reports,) *Dyer* faid, that *Ferrers* ought not to have the privilege of parliament, and that it was allowed minus jufté. And he cites *Trewynard's* cafe in the fame parliament, 35 *H.* 8., after the refolution in the laft cafe; who being a burgefs of parliament, and taken in execution, was freed not by the mace or ferjeant at arms, but by a writ of fuperfedeas of privilege; which writ was a fecurity to the fheriffs againft an action for an efcape, whether the privilege were allowable or not. And he alfo obferves upon *Ferrers'* cafe, that the fheriffs were not fent to the Tower for arrefting him, but for the fubfequent contempt in refufing to liberate him when demanded by the ferjeant at arms. With refpect however to *Ferrers'* cafe, as he was coming to attend the parliament at the time he was taken in execution, though upon a condemnation before the fitting of the parliament, the liberating of him feems to be no more than what this court would do in the cafe of a perfon, who being liable to be taken in execution of a judgment for a debt, was coming to attend the court, in obedience to a fubpœna or other lawful fummons: if arrefted in his progrefs hither, the court would difcharge him; although it might be no contempt in the fheriff making the

Trewynard's cafe, 35 *H.* 8.

(*a*) In the judgment of *Benyon* v. *Evelyn*.

arreft,

arreſt, if he did not know that the party was coming to attend for that purpoſe. The caſe of *Trewynard* (*a*) was an action of debt by executors againſt the ſheriff of *Cornwall* for the eſcape of *Trewynard* on an award of exigent and outlawry after judgment and a capias ad ſatisfaciendum. He rendered himſelf to the ſheriff on the quinto exactus. The ſheriff pleaded that he let his priſoner go upon a writ of privilege. No judgment appears; but at leaſt the caſe ſhews that it was at the peril of the ſheriff to let the party go without a ſufficient defence in law: and that it was no contempt or offence in the plaintiff, who thought himſelf injured by the eſcape, to queſtion the ſufficiency of the privilege in an action againſt the ſheriff, although the writ of privilege was iſſued by the order of the houſe of commons, which probably appeared upon the face of the writ.

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The next is *Pledall*'s caſe (*b*), of which *Prynne* ſtates, that in the parliament of 2 & 3 *Ph.* & *M.* it was ordered that Mr. Comptroller, with others of the houſe, ſhould declare to the lords their opinion that their privilege was broken; for that *Gabriel Pledall*, a member of the houſe, was bound in recognizance in the Star-chamber to appear before the council in twelve days after the end of the parliament. On this there was a conference between the two houſes; (as upon a matter of common concern to both:) and Mr. Comptroller, Mr. Speaker, and four others who had attended it, reported to the houſe, that the chief juſtices, maſter of the rolls, and ſerjeants, did clearly affirm that the recognizance was no breach of the privilege; in which the commons acquieſced. [In which caſe it is obſervable that the judges in parliament gave

Pledall's caſe, 2 & 3 *Ph* & *M.* 6th *Dec.*

(*a*) *Dy*. 59. ſtates it as of *E*. 36 & 37 *H*. 8.
(*b*) 4th part, *Prynne*'s *Reg*. 1213.

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their opinion upon the subject of parliamentary privilege; although it was for the parliament to adopt it or not as they thought fit.] In which report, says Mr. *Prynne*, four things are considerable; 1st, That the commons complained of the binding their member in his recognizance in the Star-chamber, sitting the parliament, and stated it as a breach of privilege. 2dly, That upon consideration and conference the lords clearly resolved the contrary: which contradicts their votes in Sir *Simon Steward*'s case, as illegal and erroneous. 3dly, That they advised with the chief justices, master of the rolls, king's serjeants, and counsel, and pursued their resolutions in this case against the opinion of the commons' house. 4thly, That the commons have not 12, much less 40 or 20 days privilege after parliament ended.

Duchess of Somerset v. *Earl of Manchester*, 16 *Car.* 2.

Another case of privilege mentioned in the same book (*a*) arose out of a cause before the delegates, between the Duchess of *Somerset*, appellant, and the Earl of *Manchester*, defendant, 16 *Car.* 2., touching the validity of the late Earl of *Essex*'s will. The defendant, as a peer of the realm, by his letter directed to the delegates, demanded 40 days privilege before the session of parliament to put off their sentence; whereupon the delegates, consisting of the two lord chief justices, five other judges, and other commissioners, after debate among themselves, were of opinion, 1st, That they ought not to take notice of any peer's or member's demand of privilege upon any letter or information, but only when claimed by writ of privilege under the great seal, directed to them, according to law and the ancient custom of parliament. 2dly, That when any question arises concerning privilege of parlia-

(*a*) 4th part, *Prynne*'s *Reg.* 1214.

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ment, and comes legally and judicially before the king's juſtices upon any caſe or trial in his majeſty's courts, they are the proper judges to allow or diſallow it according to law, as in the caſes of *Walſh*, *Coſins*, and others forecited: for being judges of the principal caſe, they muſt by conſequence be judges of all conſequences that attend it. 3dly, That privilege of parliament was not to be allowed in point of law to any peer or other member ſued only in another's right, as an executor, &c.; the privilege being merely perſonal for him and his neceſſary ſervants, &c. 4thly, That the earl had not privilege for 40 days before the ſeſſion of parliament. [Therein determining upon the very point of that privilege.] 5thly, That judges were not bound to proceed in courts of juſtice according to the votes of either houſe, (which votes were alterable or repealable by either houſe,) in caſes of privilege, but according to the known laws and cuſtom of the realm, their oaths, and truſts. 6thly, That they being only met to give judgment in that caſe formerly heard, wherein the earl's perſonal attendance was not neceſſary or required, they might proceed to paſs ſentence therein without breach of privilege: which they thereupon then did accordingly; reverſing the earl's will, and granting adminiſtration to the ducheſs his ſiſter.

Benyon v. *Evelyn*, *T.* 14 *Car.* 2. *Rol.* 2558.

Then came the caſe of *Benyon* v. *Sir John Evelyn* (*a*), ſo often referred to, in which Sir *Orlando Bridgeman* entered moſt largely into the caſes on this ſubject, and expreſsly decided in the affirmative the queſtion of privilege, which was raiſed by the pleadings in that caſe, whether an original might be ſued out or proſecuted againſt a member during the ſitting of parliament. It was an ac-

(*a*) This was cited from the MS. of the learned Judge in the poſſeſſion of Mr. *Hargrave* before mentioned, ante 18. Vide alſo *Carth.* 137. and 1 *Show. P. C.* 99.

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tion upon an assumpsit for goods sold and delivered to a member of parliament; to which the statute of limitations was pleaded, that the cause of action, if any, did not arise within six years: and one of the questions raised by the pleadings was, whether an original might have been sued out against the defendant and kept up by continuances while he remained a member of parliament, without a breach of privilege; that being the excuse relied on by the plaintiff for neglecting to sue during part of the time that had occurred from the cause of action till the action commenced, namely, from the 21st till the 24th *Car.* 1. when the king died. That learned judge considered himself bound to decide the question of privilege thus brought in judgment before him, although, as he says, "he should have been glad not to have had an occasion to have delivered his opinion upon the point for two reasons; first, because it is a tender thing for an inferior court to judge of the privileges of a superior court:" and then he refers to what has been noticed in 4 *Inst.* 50.: but he observes, that *Thorpe*'s case and other cases there cited "only extend where the privilege of parliament comes in debate in the house of lords. The judges are not to determine *there* what the privilege of parliament is in such case; for the conusance thereof belongs to the lords of parliament and not to the judges. And yet even there the judges deliver their opinions to the lords as assistants, what the course of the common law was in such cases, &c. But out of parliament, where upon an action at common law a question concerning privilege of parliament arises, nothing hath been more frequent than for the judges of the common law to deliver their opinions concerning it, and consequently to give their judgments. The king himself daily permits his privileges and prerogatives

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gatives to be determined between him and his subjects in the courts at *Westminster*, by the common law. And when in a common action the privilege of parliament doth come to be part of the plea or justification, it is of necessity that the privilege, whether there be such, and what the extent of it is, come also into consideration." The next cause, he says, why he wished to avoid the question as to the privilege of parliament, was that it had been said at the bar to have been declared by the committee of privileges of the house of commons in the then last sessions, "that it was a breach of privilege to sue out and file an original against a member of parliament; which was the point in question." But this he says was denied by some parliament men of great note and learning of whom he had inquired. "But, (he adds,) if it be so alleged, I shall give all reverence as becomes me to all opinions and votes, as proceeding from so honorable a body; but I am under the obligation of an oath to do equal law, according to the best of my own judgment, whatsoever the authority of other opinions or resolutions may be." He then cites (*a*) two cases in the time of *Ed.* 3. one of the 29 *Ed.* 3. 14. where the judges of assize proceeded according to law, notwithstanding such a resolution and command to surcease. The other of the 13 *Ed.* 3. (*Fitzh.*) *Voucher*, *pl.* 119. where notwithstanding there had been two resolutions of parliament upon the matter, it was again brought in judgment before the judges in C. B. "The use (he says) which he makes of it is, that resolutions or votes in either house of parliament in the absence of the parties concerned are not so conclusive in courts of law, but we *may* with due respect, notwithstanding these resolutions, nay, we *must* give our judgment

29 *Ed.* 3.

13 *Ed.* 3.

(*a*) P. 8. of the MS.

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according as we upon our oaths conceive the law to be, though our opinion ſhall fall out to be contrary to thoſe reſolutions or votes of either houſe."

The only remaining caſe neceſſary to advert to on this part of the ſubject is that of *The King* v. *Knollys* (a), which was an indictment found at *Hicks's-hall* againſt *Charles Knollys* for murder. A plea in abatement was put in, that *William Knollys* was created Earl of *Banbury*, from whom, through meſne deſcents, the honor came to the defendant. Replication; that the defendant petitioned the lords in parliament to be tried by his peers, and they diſallowed his peerage, and diſmiſſed the petition. The defendant demurred; and the replication was adjudged to be bad; Lord *Holt* and the reſt of the court being of opinion, that "this order of the houſe was not a judgment of parliament. The parliament (ſaid he) conſiſts of the king, the lords ſpiritual and temporal, and commons: the judicial power is in the lords only, yet legally and virtually it is the judgment of the king, if not of the commons." And indeed there are ancient precedents of writs of error made returnable before the commons as well as the lords; and there are inſtances mentioned by Lord *Hale* of the commons having been parties in giving the judgment: and it was not an uncommon thing to proceed in full parliament even upon decrees of the court of Chancery, and to reverſe them by the act of the whole parliament. "This dignity (Lord *Holt* adds) is a title by common law; and if a patentee be diſturbed of his dignity, the regular courſe is to petition the king, who indorſes and ſends it into the chancery. No plea was depending in the lords, for he did not petition to enjoy, but ſuppoſed himſelf in poſſeſſion. Here was no judgment; a court can give no judgment in a

(a) 2 *Salk.* 509. S. C. *Carth.* 297. 1 *Ld. Raym.* 10.

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thing not depending, or that does not come in a judicial way before the court: here the title to the earldom was not before them. It is ſaid that this judgment was given ſecundum legem parliamenti; but Lex parliamenti muſt be looked on as the law of the land. But admitting that it were a particular law, yet if a queſtion ariſe determinable in the K. B., the K. B. muſt determine it." For this he cites *Benyon*'s caſe. And the defendant in that caſe was not tried at all(*a*). In 1 *Ld. Raym.* 18. it is ſtated that Ld. C. J. *Holt* was ſummoned to give his reaſons for this judgment by the peers, but he refuſed to do it in this extrajudicial manner; for which ſome of the peers would have committed him to the Tower.

From all theſe authorities theſe concluſions may be drawn: Firſt, that for the purpoſe of aſcertaining and confirming the privileges of parliament, recourſe was always had, anciently at leaſt, to the law, by ſuing out the writ of privilege, which iſſued out of chancery under the great ſeal of *England*. Secondly, that the privilege was claimed as a privilege of the whole parliament, and not of one houſe only: ſo that it was the common concern of the whole; and therefore no danger reſulted from the courts of common law taking cognizance of it, from whoſe deciſion a writ of error lay to one branch of the parliament, the lords; becauſe they had an equal intereſt in protecting the privilege, if by law it exiſted, for themſelves, as well as for the houſe of commons. Thirdly, that the uſage and cuſtom have been, where there was any doubt what the law was, not to act upon it by the reſolution of one houſe only, but for the one houſe making the claim to lay the matter before the other; ſo that if the privilege claimed were confirmed, it became then the act of the whole parliament, which could not be

(*a*) Vide *Hargrave's Preface to Ld. Hale's Juriſdiction of the Lords' Houſe*, 227.

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disputed by any, and which the judges were bound to take notice of and consider as law in future, whether or not it was allowed before. [Lord *Ellenborough* C. J. How could the concurrence of the two houses without the king make it a more perfect law than if it stood upon the resolution of the one house only?] In almost all the cases it was done by an act of parliament with the king's assent. In most of them previous to *Ferrers'* case, it went in the form of a petition to the king in parliament. It is not meant, however, to say that in any case the two houses could make a law respecting privilege, without the king, supposing the privilege did not exist before; but in early times the proceedings in ordinary cases, where the privilege was known and acknowledged, was by the writ of privilege; and in new and extraordinary cases the means taken for having it acknowledged was by bringing the question before the whole parliament. Fourthly, that the judges have a right, and indeed are bound to determine all cases of privilege, brought judicially before them, except when they arise in the lords' house of parliament, where they are no parties to the determination: but where the question comes before them in a legal way in their own courts, they are bound to take cognizance of the existence and extent of the privilege, and to decide upon it; and the usage also appears to have been for them to advise upon it even in parliament when their advice is required.

Cases of false or double returns, and for injuriously taking or refusing votes.

There is another class of cases of actions upon false and double returns, and likewise for improperly taking or refusing votes of electors, where doubts have arisen whether the courts of common law could take cognizance of them on account of their relating to matters concerning parliament. The final result of those cases has established the right of the common law courts to take cognizance

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of ſuch queſtions ariſing in the way of actions brought by the parties grieved; and the principle of thoſe deciſions extends to the preſent caſe. Thoſe caſes are ſo well known that it is ſufficient to allude to them generally, and to the acts of parliament which have paſſed reſpecting them. The firſt of theſe caſes was *Nevill* v. *Stroud* (*a*), which was an action for a falſe return, and is ſtated to have been oftentimes argued in the Common Bench, and by them delivered into parliament, where the record continued ſome time and was argued; and afterwards, when the long parliament was re-aſſembled, of which the plaintiff was a member, the ſame record was again brought to the parliament by Mr. Juſtice *Atkyns*, and by the order of parliament it was adjourned into the exchequer-chamber, there to be argued before all the judges, and after their opinions given, the record was to be remanded into C. B., which court by the rule of the parliament was to give the judgment accordingly. So that the parliament, inſtead of wiſhing to confine the queſtion of falſe returns entirely to their own cognizance, where an action had been brought in one of the courts of *Weſtminſter*, and the judges, as was frequently the caſe in ancient times on matters of difficulty, had referred the record to the parliament, the latter returned it again into the exchequer-chamber, to have the queſtion decided by the judges. The report ſtates that the judges being all aſſembled in the exchequer-chamber, the order of parliament was read, ſigned by the clerk of parliament, by which they were entitled to oyer of the record: after which the record was read by their own officer. The reſult does not appear (*b*). Then

Nevill v. *Stroud*, *Hil.* 1569.

(*a*) 2 *Sid.* 168.

(*b*) It is ſaid that no judgment was given. 2 *Lev.* 115. 3 *Lev.* 30. and 1 *Lutw.* 89.

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Bernardiston v. *Soame.*

came *Bernardiston* v. *Soame* (a). That was an action upon the case for a double return, which was tried at bar; and it was moved in arrest of judgment by *North*, attorney-general, and *Scroggs*, king's serjeant, that the action would not lie: and they said that the case of *Nevill* v. *Stroud* was never determined; but in respect of the difficulty was sent into parliament, where it never received a determination. They then objected that the falsity of the return was only examinable and punishable by the house of commons, who in that instance had punished the returning officer by committing him, and that this court had no cognizance of it. The case was adjourned to the next term, when the return being stated and found to be false and malicious, and with intent to put the plaintiff to charge, *Hale*, *Twysden*, and *Wylde* held the action lay, and gave judgment for the plaintiff; *Rainsford* doubting: it appears however from the report of the same case in *Freeman* (b), that *Rainsford* thought the action not maintainable. The case however afterwards went to the Exchequer-chamber, where by the opinion of *North* C. J. (who had been counsel for the defendant) and five other judges against two, the judgment of K. B. was reversed, which reversal was affirmed upon writ of error to the house of lords (c): yet that house first heard the opinions of all the judges upon the subject, who were seven to five in favour of the affirmance: though that was a question respecting the privilege of the house of commons, whether that house was not the only forum where the matter could be heard. But after the Revolution that judgment of the house of lords was in effect reversed by the whole

(a) 2 *Lev* 114. (b) *Freem.* 390. and 430.
(c) Vide 7 *St. Tr.* 451-3. and *Pollexf.* 470.

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parliament, which passed the declaratory act of 7 & 8 *W.* 3. *c.* 7. *s.* 1. declaring all false returns wilfully made of any member to serve in parliament to be against law, and thereby prohibited; and that the return of any member contrary to the last determination of the house of commons as to the right of election in the particular place, shall be deemed to be a false return; and giving an action on the case in the courts of law to the party grieved, with double damages and full costs. And such was the opinion of Lord C. J. *Willes* in *Myddleton* v. *Wynne* (*a*), where, after noticing the prior opinions on the subject, he says, "upon this point I give no opinion of the rest of the judges, but speak this as my own opinion only: though it has never yet been determined, I should have no doubt but this action [for a false return] would lie at common law; and it would be a reflection on the law to say it would not; because here is certainly damnum cum injuriâ, which by the policy of the common law ought to have some remedy." And so the statute of *William* considers it; for it gives an action to the party grieved. [*Bayley* J. The clause which gives the action is an enacting, and not a declaratory one.] That was necessary, because it not only gives the action, but gives it with double damages. But the argument would be the same upon the first or declaratory clause of the statute, if the enacting clause had been left out; and so it appears to have been considered by Lord C. J. *Willes* in the last-mentioned case. The objection there taken was, that the action could not be heard till the question as to the right of election had been decided in parliament: to which he answers, that "the construction contended for by the plaintiff in error would overturn the whole act of parlia-

Myddleton v. *Wynne.*

(*a*) *Willes*, 597—606. S. C. 1 *Wils.* 125.

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Prideaux v. *Morice*.

Onſlow's caſe.

Aſhby v. *White*.

(*a*) 1 *Lutw.* 82-9. *Salk.* 502. and 7 *Mod.* 13.
(*b*) 2 *Ventr.* 37. and 3 *Lev* 29.

v. *White*

v. *White and others* (a), which was an action on the case against the returning officers of the borough of *Aylesbury* for refusing the plaintiff's vote at the election of members to serve in parliament for that borough. Ld. C. J. *Holt* there held the action maintainable, against the opinions of the other three judges of this court, who gave judgment for the defendant; but that judgment was afterwards reversed by the house of lords, on a writ of error, and judgment given for the plaintiff by 50 lords against 16; *Trevor* C. J. of C. B. and *Price* B. being of opinion with the three judges of K. B.; and *Ward* C. B. and *Bury* and *Smith*, Barons, being of opinion with Ld. C. J. *Holt*: *Tracy* J. doubted, and *Nevill* and *Blencowe* Js. were absent. But Ld. *Raymond* says, he had it from good hands that *Tracy* agreed clearly that the action lay, but was doubtful upon the manner of laying the declaration. The decision of the house of lords in favour of the right of action in that case has been considered and acted upon as law ever since. It was so in *Milward* v. *Serjeant* (b), upon

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Milward v. *Serjeant*, *Hil.* 26 *G.* 3. *B. R.*

(a) 2 *Ld. Ray.* 938. *Salk.* 19. 6 *Mod.* 45. and other books.

(b) *Hil.* 26 *G.* 3. *B. R.* This case was cited from 1 *East*, 567., where it was referred to by *Lawrence* J. in *Harman* v. *Tappenden and Others*; and also in the note of *Drewe* v. *Coulton*, there cited. The following note of it has since come to my hands from Mr. *Durnford*'s collection, which is entered as of *E.* 26 *G.* 3.—" *Milward* v. *Serjeant*, in error. Action against returning officer, similar to *Ashby* v. *White*, on which account the Court would not hear it argued. It came by writ of error from the common pleas. Lord *Mansfield* said,—There is a decision of the house of lords in point. As we said in *Coulson* v. *Coulson*, whatever our private opinions may be, we shall not go counter to a decision by the House of Lords. If it were res integra, he intimated a pretty strong opinion that the action would not lie, unless there were express malice. *Garrow* said on this, that in *Ashby* v. *White* there was malice, but none in this: there, it was quod malitiosè intendentes, &c.; and here it is only " wrongfully and injuriously intending," &c. *Curia*. It is not said in *Ashby* v. *White*, that he *maliciously obstructed*, &c.; the *malitiosè intendens* is nothing; it is no averment: and *Holt* expressly says, I do not go on the malice; he laid it out of the question. And Lord *Mansfield*

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upon the like action in this court: Lord *Mansfield* refused to hear any argument unless the case could be distinguished from *Ashby* v. *White*; saying, that the question had been already determined in the house of lords. In that case there was a verdict for the plaintiff. In a subsequent case, of *Drewe* v. *Coulton* (*d*), which was an action against the returning officer of *Saltash* for refusing the plaintiff's vote as a burgage tenant, at the election of members to parliament, Mr. Justice *Wilson* nonsuited the plaintiff at the trial upon the opening; the refusal of the vote not appearing to have been wilful and malicious; which he held to be necessary to sustain the action at common law: but no doubt was entertained of the action's being maintainable if the refusal were malicious. [Lord *Ellenborough* C. J. asked, whether in *Milward* v. *Serjeant* it was laid to be wilfully and maliciously done.] In all the cases subsequent to *Ashby* v. *White*, it appears to have been laid in the same form as in that case, which was considered to have been decided on the ground, that the declaration (which in that case alleged that the defendants, knowing the premises, but contriving, and fraudulently and maliciously intending to injure the plaintiff in that behalf, and to hinder and deprive him of his privilege in the premises, did hinder him to give his vote in that behalf, and did absolutely refuse to permit him to give his vote in that behalf, &c. for

(*d*) Cited in 1 *East*, 563. *note*.

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field said—In the house of commons they proceed as for a breach of privilege. In the great *Denbighshire* election I advised three different petitions to the house of commons; one of 400 freeholders struck off the poll; that they might be at liberty to bring actions at common law. You did not argue this in *C. B.* Judgment affirmed." Vide 2 *Luders*, 248., who says that the defendant's malice made part of the plaintiff's case at the trial.

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that election, &c.) sufficiently stated the act to be wrongfully done. Mr. Justice *Tracey*, indeed, appears to have doubted, whether it was sufficiently stated to be wrongfully and maliciously done: but the house of lords held the gravamen of the action to be sufficiently laid in the declaration. Besides, in none of the prior cases did this Court decide against the action, because the declaration did not lay the injurious act to be wilfully and maliciously done, but because the courts of law could not take cognizance of the privilege of parliament. [Lord *Ellenborough* C. J. There was no question agitated, as far as I recollect, in any of the cases before the case of *Drewe* v. *Coulton*, as to the allegation of malice; unless it were in a case which Mr. Justice *Wilson* probably had in his mind, of an action, in which I believe he was counsel, which had been tried some time before against the returning officer of *Preston* (*a*), who under an error, in which he had only followed the example of his predecessors in the office for many years before, had made the same return upon the accustomed right of voting as they had done: though upon petition to the house of commons, the class of voters rejected by him had been received. But as it appeared that he had acted, not with any malicious purpose, but conformably to the old usage and by legal advice, that was considered to be a sufficient justification for him, and he obtained a verdict.] The wrongfulness of the act complained of is the very gist of an action on the case: but the house of lords must have considered in *Ashby* v. *White*, that the wilfully doing of an act injurious to the plaintiff was sufficient to found the action. All these cases are material to shew, that

(*a*) This is mentioned in 2 *Lud.* 246. as the case of *General Burgoyne* v. *Moss*, which was tried after the election at *Preston* in 1768.

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the subject-matter concerning the parliament, and being examinable there, as the right of voting is, diverso intuitu, does not take away the power of this court to determine upon it when brought in judgment before them by action. The last case of this description, was an action on the case brought in the court of C. B. in 1784, by the late Mr. *Fox* against *Corbett*, high bailiff of *Westminster*, for not making the return of the plaintiff's election to parliament in due time, but proceeding with a scrutiny after the period when he should have returned the writ. A verdict was obtained for 2000*l.* damages, and a motion was afterwards made in arrest of judgment, which was ultimately abandoned by the defendant.

Fox v. *Corbett*, 1784.

Cases on the Habeas Corpus writ.

Another class of cases has occurred upon the writ of habeas corpus, which cases, though they may seem at first sight to bear against the principle deduced from the other authorities, that this court will take cognizance of the privilege of parliament, yet are either distinguishable from, or wholly irreconcileable with those authorities. The first of these is Lord *Shaftesbury*'s case (*a*), who being committed with other peers by the house of lords, for *high contempts* against the house, during the pleasure of his majesty and of the house, sued out the writ of habeas corpus returnable in K. B.; and on the return, it was objected by the earl's counsel, inter alia, 1st, that the general allegation of *high contempts* was too uncertain; for the Court could not judge of the contempt if it did not appear in what act it consisted. 2dly, That it was not shewn where the contempt was committed; and in favour of liberty it should be intended to have been committed out of the house. It was argued, that the return of such a commitment by any other court would

Ld. Shaftesbury's case, 1677.

(*a*) 1 *Mod.* 144. and 2 *St. Tr.* 615.

clearly

clearly be too general and uncertain; for which *Bushell's* case (a) was cited; and that a commitment by the house of peers made no difference: and they cited *Benyon's* case. It was admitted there by the counsel (b) for the house of lords, that "if an action be brought, where privilege is pleaded, the Court ought to judge of it as an incident to the suit whereof the Court was possessed;" but not, they said, *directly*, as on a habeas corpus upon a commitment for a contempt *in the same session*: and on that principle, the decision there passed against the earl, who was remanded. There the question of privilege came directly and not incidentally before this Court. The application there was to discharge a person who had been committed by another court, the house of lords, for an alleged contempt against them. The answer would have been the same in the case of a commitment by the court of C. P. for a contempt, and an application to this Court to discharge the party committed; this Court would certainly refuse the application, and refer him back to C. B. For otherwise if he were discharged, the Court of C. B. would commit him again, and there would be a conflict of jurisdiction between the two courts upon a point on which there could be no appeal to a superior jurisdiction. This is the principle which governs all the cases on the writs of habeas corpus, and on which alone they can be supported; where the Courts have refused to interfere, to discharge persons committed for contempts generally by either house of parliament during their session. Suppose a party was arrested upon a void writ out of C. B. as if a

(a) *Vaugh.* 135.

(b) By *Jones*, Attorney General, 1 *Mod.* 154. See the same thing said by Lord C. J. *Holt* in the case of the *Aylesbury men*, 8 *St. Tr.* 162. by Lord C. J *De Grey*, in *Brass Crosby's* case, 3 *Wilf.* 202.; which latter was referred to by *Grose* J. in *Rex* v. *Flower*, 8 *Term Rep.* 325.

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writ tested in one term were not returnable till the second term, which has been held to be a void writ (*a*); if he sued his writ of habeas corpus returnable in this court instead of in C. B., this Court would not discharge him, but would refer him to the court out of which the writ issued. [Lord *Ellenborough* C. J. Without touching the question of contempt, I should rather think, that if a person arrested on a process absolutely void upon the face of it, claimed his discharge of us, we should discharge him, whether it were on exchequer or common pleas process. As suppose the defect in the process were in a matter required by positive statute, of which all the courts must take cognizance. If indeed it were a doubtful matter, which might involve any question as to the practice of another court, we should send him to that court.] All the cases now under consideration arise upon the common law writ of habeas corpus, which is like any other common law process, and therefore the case may be argued as if the habeas corpus act did not exist. Adverting then again to the case of the defective writ before put, it should rather seem that, except by writ of error, one Court cannot act on or interfere with the proceedings of another court of co-ordinate jurisdiction; and that therefore this Court would not discharge a person from custody even under such defective writ issued by another court of *Westminster-hall*. For if this Court should relieve in such a case, and the other Court should differ; as there could be no writ of error, it would bring on an immediate struggle between the two Courts: whereas if the party be referred to the court from whence the writ issues, that Court has power to relieve and would

(*a*) Qu. *Davy* v. *Hollingsworth*, *T.* 24 *G.* 3. *K. B.*; or *Adams* v. *Spang*, 1 *Wils.* 155.

relieve

relieve him if he were entitled to it: but even if it did not, the party grieved would not be without remedy; becaufe he might bring an action in this court for the arreft againft the party who fued out fuch void writ, in which action this Court would take cognizance of the procefs of the other Court, and a writ of error would lie from their judgment to a court fuperior to both. So in refpect to thefe applications to the common law courts to difcharge from commitments for breaches of privilege, when they refufe to enquire as to the particular caufe of commitment, they decide no queftion of jurifdiction againft their own cognizance of the privileges of parliament; nor is the party complaining left without remedy, if the commitment fhould turn out to be illegal; becaufe though this Court will not difcharge him by fummary proceeding upon the habeas corpus writ, yet he has his remedy by action, in which the legality of the commitment may be put in iffue. In that fhape, this Court affumes no difcretionary control over the proceedings of any other; becaufe a writ of error would lie upon it to the houfe of lords, if the action were not maintainable: but as no writ of error lies upon the proceeding by habeas corpus, the party would be fhut out of his remedy, if the determination of the Court were wrong, and he had no remedy by action. [*Bayley* J. If the court of C. B. were to commit for a contempt, would an action lie againft the officer; and would this Court try in fuch an action, whether or not the party had been guilty of the contempt? I put that cafe, as an anfwer to it one way or the other may apply ftrongly to the prefent.] That cafe will be diftinguifhed from the prefent in another part of the argument (*a*): at prefent it is fuffi-

(*a*) Poft, 77.

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Rex v. *Darnel and Others*, 1627.

cient to shew, that the cases of refusal to discharge on writs of habeas corpus do not bear against this action. One of the most important of these cases was that of *The King* against *Sir Thomas Darnel and four Others* (a), which was prior to that of Lord *Shaftesbury*; and though it was not upon a commitment by either house of parliament, but by the privy council, yet it is important to be considered, as well because it led to the petition of right, as because it shows the distinction between the habeas corpus cases and the present. The defendant *Darnel*, with others, was committed by the privy council for refusing to lend money to the king on the commissions for loans, and brought his habeas corpus cum causâ. The warden of the Fleet returned, that he had the party in his custody by virtue of a warrant of two of the privy council directed to him in his verbis: "Whereas heretofore the body of Sir *Thomas Darnel* hath been committed to your custody; these are therefore to require you still to continue him, and to let you know, that he was and is committed by the special command of his majesty, &c. and this is the cause of the detention of the said Sir *Thomas Darnel*." It was objected, that the return was insufficient, the warrant not specifying the cause of commitment: the Court however determined that it was good, and that they had no jurisdiction on commitment by the king or the lords of the council; and this on the authority of precedents (b); but persons so committed could be delivered only by the direction of the king or lords of the council, where no cause of commitment is alleged. And they cited the resolution of all the judges in *Anderson*'s time, that if one be committed by command

(a) 7 *St. Tr.* 113.

(b) But see several cases stated in *Moor*, 839. where persons so committed had been delivered on habeas corpus in the time of Queen *Elizabeth*.

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of the king, he is not to be delivered by habeas corpus in this court; for we know not the cause of the commitment. This judgment produced the petition of right (*a*), which declares the decision illegal. It would in fact have vested an arbitrary power in the king. But while that opinion prevailed, the consequence would indeed have been fatal, if an action of this description would not have lain. For then a person might have been committed by the privy council, by the command of the king, for a cause confessedly illegal; such as not submitting to a forced loan; and he could have had no relief by habeas corpus in this court, if he were committed generally by the king's command: and the privy council might have held him committed as long as they pleased; which would have established nothing short of arbitrary power. But if he could bring his action for the false imprisonment, then, though the courts had refused to examine into the contempt or breach of privilege upon the writ of habeas corpus; still he would have had his legal remedy in damages for the injury. The decisions, therefore, of the Courts on those writs, and the declarations of different judges, that they could not judge of the privileges of parliament, delivered on such occasions, where the parties committed by either house of parliament for breach of privilege sought that summary relief, conclude nothing against the right of action, which it was still open to the parties grieved to pursue, in order to try the legality of the privilege thus asserted: and there was nothing inconsistent with that right, in the Courts' refusing to discharge the parties committed on habeas corpus. [Lord *Ellenborough* C. J. Do you find in any of

(*a*) Stat. 3 *Car.* 1. *c.* 1.

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the cafes, where the Court have refufed to liberate the party on the habeas corpus, that they have referred him to another remedy by action?] No intimation of that fort is obfervable: but it is only upon the ground of fuch an ulterior remedy that the decifions in thofe cafes appear to be maintainable: for certainly it appears by all the other authorities referred to, that the judges not only may but muft take cognizance of the privileges of parliament when brought *incidentally* in judgment before them upon action brought, though not when the privilege comes *directly* into queftion, as in the cafes of habeas corpus; for that would produce an immediate clafhing of jurifdiction between the Court committing for the contempt, and the other Court affuming to difcharge the party as committed without legal authority. The perfon committed is, as it were, in the cuftody of the committing Court, and the object of the application upon the writ of habeas corpus is to take him out of their cuftody; the queftion of privilege and contempt therefore comes directly in judgment: it would be the immediate fubject of conteft between the two jurifdictions; and the one Court could not difcharge the party out of the other's cuftody, without affuming to exercife a jurifdiction over its proceedings. This Court, therefore, may properly and confiftently with the party's ulterior remedy by action, if he have been illegally committed by either houfe of parliament, refufe to take cognizance in that mode of the queftion of privilege. But it is quite otherwife in the cafe of an action brought by the party grieved, difputing the privilege claimed or its due exercife: for the action operates no change of cuftody, and induces no clafhing of jurifdictions: the queftion of privilege arifes only incidentally, and by way of juftifica-

tion for the act of imprisonment, which is the immediate foundation of the action. No superiority or control is in this shape assumed over the proceedings of the committing Court; nor can any public detriment ensue, if the Court in which such an action is brought should pronounce an erroneous judgment upon the question; as it would be capable of being corrected by the house of lords, the court of dernier resort, upon writ of error; which has the same interest with the other house of parliament in upholding the just privileges of parliament. The cases of *Murray* (a), *Crosby* (b), *Oliver* (c), and *Flower* (d), which were all cases upon habeas corpus, are all distinguishable upon the same ground. [Lord *Ellenborough* C. J. You do not then rely upon *Bushell's* case (e); for if you say that one Court cannot interfere upon habeas corpus with the commitments of another Court, there is an end of *Bushell's* case, which was a direct interference of that description, and a discharge of the party committed on the ground of an insufficient return.] That was a case of a discharge by the court of C. B. of a person committed by a court of oyer and terminer, and not the case of a commitment by a court of co-ordinate jurisdiction, such as the K. B. or Exchequer. It was upon that distinction that the party was discharged from that commitment, on account of the cause of the commitment not being particularly stated, so that the Court above might judge whether it was a sufficient cause for detaining the party. *Bushell's* case is therefore an authority to shew, that where the cause of commitment can be judged of, as by a superior court, it ought

(a) 1 *Wils.* 299. (b) 2 *Blac. Rep.* 754.
(c) In the Exchequer, in *Easter* term, 1771.
(d) 8 *Term Rep* 314. (e) *Vaugh.* 135.

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to be ſtated; and that if a ſufficient cauſe be not ſhewn, the Court which has power to judge of it will diſcharge the party. There are caſes in *Moor*, 839, 840. of commitments by the court of chancery, not ſtating for what cauſe; and on the priſoners' being brought up by habeas corpus, this Court, it is ſaid in *Buſhell's* caſe (140,) would not enquire, whether the commitments were on the equity or law ſide, but diſcharged the priſoners in either caſe alike. It is not however clear, whether ſuch commitments might not have been conſidered at that period as made by a court not of co-ordinate juriſdiction, which might be a reaſon for diſcharging the priſoners where no ſufficient cauſe appeared: for where it was ſhewn that the cauſe of commitment was for diſobeying a decree, the diſcharge was refuſed (*a*). [Lord *Ellenborough* C. J. Before you quit *Buſhell's* caſe, I wiſh you to advert to what Lord C. J. *Vaughan* there ſays (*b*), that the cauſe of commitment ought to appear to the Court before whom the commitment is returned as clearly as it appeared to the Court who made the commitment. Is not that laid down generally, or is it confined to commitments by inferior courts?] He appears to lay it down generally; and that is material in the conſideration of the manner in which the cauſe of commitment is ſtated in the Speaker's warrant in this caſe.

[Di]fference be[tw]een the two [hou]ſes as to the [reco]rd of their [pro]ceedings.

This is the caſe of a commitment by the houſe of commons, which is no court of record; and though it be directed in an old ſtatute, that the perſons attending the houſe of commons ſhall not leave the parliament to the end of parliament, until it be noted in the clerk's book of

(*a*) This was in the caſe of *Wm. Allen*, *Tr.* 13 *Jac.* 1. cited in *Apſley's* caſe, *Moor*, 840.

(*b*) *Vaugh.* 137.

parliament,

parliament; making thereby no diſtinction between the two houſes; yet if that made the book a book of record, it would not make the houſe of commons a court of record for any other purpoſe: and if its proceedings in general be not of record, an allegation to that effect will make no difference; but this Court will recognize the whole court of parliament, and will diſtinguiſh between the juriſdiction of that whole court, and the juriſdiction of the houſe of commons ſingly. The houſe of lords, indeed, is a court of record, and the difference between the uſages of the two houſes, in reſpect to perſons guilty of contempts before them, ſeems to be founded upon the eſſential difference, that the one is a court of record, and the other is not. For commitments for contempts by the houſe of lords are for a time certain; and they frequently impoſe fines, which operate by way of puniſhment of the offender, as well as for the immediate removal of the obſtruction to their proceedings; and no Court, which is not of record, can fine. And though there be one or two inſtances, in very ancient times, of the houſe of commons having exerciſed a power of fining, yet being ſatisfied that it was not warranted, they have long ceaſed to exerciſe it: and the only way of accounting for their having diſcontinued to fine, and for their not ſentencing to impriſonment for a limited time, when the lords have done both, is that the houſe of commons is not a court of record. Then, though the party committed for a contempt by a court of record may be eſtopped from diſputing what is ſtated on the record, yet there is no ſuch eſtoppel in a court not of record; and therefore there muſt not only appear a good cauſe of commitment upon the face of the warrant itſelf, but it may even be argued further, that the fact ſhould have been averred, which it is

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The cause of commitment must appear with certainty to the Court having jurisdiction to inquire of it.

not, that the plaintiff had been guilty of a contempt and breach of privilege, and what that contempt and breach of privilege was, in addition to the resolution of the house to that effect stated.

But at any rate, whether such an averment was necessary or not, nothing can be implied in favour of a warrant of commitment, not issuing especially from a court of record, which is not stated in the warranti tself. The opinion of Ld. C. J. *Vaughan* in *Bushell's* case (*a*) before referred to, is most precise to this point. "The writ of habeas corpus (he says) is now the most usual remedy by which a man is restored again to his liberty, if he have, against law, been deprived of it. Wherefore the writ commands the day, and the cause of the caption and detaining of the prisoner, to be certified upon the return: which if not done, the Court cannot possibly judge, whether the cause of commitment and detainer is according to law or against it. *Therefore the cause of commitment ought by the return to appear as specifically and certainly to the judges of the return, as it did appear to the Court or person authorized to commit:* else the return is insufficient," &c. [Lord *Ellenborough* C. J. Every person must have great respect for the Lord C. J. *Vaughan*, on account of his public virtues; but how can that doctrine of his, in its full latitude, stand with the cases which have been decided upon the habeas corpus writ?] It may, when taken with the exceptions which he afterwards (*b*) notices, of general commitments for treason or felony, which are admitted to be good: but these, he observes, are not like the cases then under his consideration, namely, cases of commitments for contempts: "for upon a general commitment for treason or felony, the prisoner (the cause appearing) may press

(*a*) *Vaugh.* 136, 7. (*b*) *Ib.* 142, 3.

for

for his trial; which ought not to be denied or delayed; and upon his indictment and trial, the particular cause of his imprisonment must appear; which proving no treason or felony, the prisoner shall have the benefit of it. But in this case, (*i. e.* of a commitment of a juryman for a contempt in acquitting persons indicted, against evidence and the direction of the Court,) though the evidence given were not full nor manifest against the persons indicted, but such as the jury, upon it, ought to have acquitted those indicted; the prisoner shall never have any benefit of it, but must continue in prison when remanded, until he hath paid that fine unjustly imposed upon him, which was the whole end of his imprisonment." Besides, in the case of treason or felony, the prisoner is charged with a known offence, and if the charge be made maliciously and without probable cause, he has his remedy by action against the prosecutor who procured his commitment. [Lord *Ellenborough* C. J. Such a remedy is but a poor exchange for the loss of liberty in the mean time, if the party were by law entitled to be discharged upon a commitment in that general form. But the position of Ld. C. J. *Vaughan*, before adverted to, is laid down broadly, without any qualification or restriction as to commitments by inferior courts; and however able that judgment of his is in general, I very much doubt, whether that part of it can be sustained in its full extent.] If, in the case of treason or felony, there were a probable cause for the party's commitment, however hard the case may be, if he be ultimately found to be innocent, he suffers no legal wrong by being committed for trial on such probable cause, which is a commitment for safe custody, and not for punishment: but that is very different from the case of a commitment by the house of commons for a contempt or breach of privilege, where if it be sufficient to state the cause generally,

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generally, the party grieved may be continued in prifon, without any means of procuring his difcharge, or a trial for the offence; as he may in the cafes of treafon or felony, which muft take place within a reafonable time, otherwife the prifoner will be difcharged: he muft therefore be without remedy, unlefs an action lie for the falfe imprifonment, in which the fufficiency of the juftification can be brought in iffue. This action then is maintainable if it do not appear upon the warrant that there was a good caufe of commitment; and ftill more, if that which is there ftated to be the caufe of commitment be infufficient in law. The Court has a general jurifdiction over the fubject matter of this action, which is for a trefpafs againft and imprifonment of the plaintiff's perfon; and every fubject of the realm, when imprifoned, has a right to appeal to the law againft any other who procured or aided in that trefpafs and imprifonment, in order to afcertain whether he was rightly arrefted and imprifoned or not. The action of trefpafs lies for the act of force againft the perfon or property of another, whatever be the intention of the perfon committing it, unlefs he can juftify it for a legal caufe.

Critical objections to the prefent warrant of commitment.

What then is the juftification alleged in this cafe? It is in fubftance, that Sir *Francis Burdett*, a member of the houfe of commons, had admitted in his place, that a certain paper was printed by his authority; which paper the houfe refolved to be libellous and fcandalous, and reflecting upon the juft rights and privileges of the houfe, and that Sir *F. B.* had been thereby guilty of a breach of the privileges of the houfe. Now if the doctrine of Lord C. J. *Vaughan* be well founded, enough is not ftated to fhew this to be a breach of privilege. A mere libel, quà libel, is in itfelf no breach of privilege. But it is not neceffary to contend, that a libel

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upon the houfe or its proceedings may not be a breach of privilege; becaufe it does not fufficiently appear upon this warrant, that this was a libel upon the houfe of commons or its proceedings. But whatever the libel was, it could be no breach of privilege, nor an offence of any kind, unlefs it were *publifhed*. It might be *printed*, and yet not *publifhed*; for different compofitors might have taken different parts, as is commonly the cafe; fo that no one of them might have known the contents of the entire paper. And though it had even been ftated to be publifhed, yet if it were not ftated to be publifhed by the plaintiff's authority, it would have been no breach of privilege in him: and if no breach of privilege, then there was no good caufe of commitment. It is not ftated pofitively, that the houfe had adjudged the plaintiff to be guilty of a breach of privilege, and that therefore they ordered him to be committed; but only that the houfe had refolved that a certain printed paper was libellous, &c.; and that Sir *F. B.*, who had admitted the paper to be printed by his authority, had been *thereby* guilty of a breach of privilege; which is with reference only to the act before imputed to him. It is ftated that the houfe refolved, that the paper, fo admitted by the faid Sir *F. B.* to have been printed by his authority, was "a libellous and fcandalous paper, reflecting on the juft rights and privileges of the faid houfe;" but that does not neceffarily fhew that it was a libel againft the houfe of commons; and the words are not to be conftrued beyond their due and proper fenfe in a matter affecting the liberty of the party. It might be a libel againft the houfe of lords, and the paper might contain *reflections* (not *injurious* or *wrongful* reflections, for it is not fo ftated, but fair and lawful reflections) on and in vindication of the juft rights and privileges of the commons: but

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but if it were not a libel upon the houfe of commons, there could be no ground for imputing it as a breach of their privileges. It would not be fufficient to allege in an indictment, that the defendant obtained money from another by *pretending* fuch and fuch things, without charging, that he *falfely* pretended, &c.(a) So the words *reflecting on*, do not in themfelves import *injurioufly reflecting on*, though they may be fometimes ufed in that fenfe in familiar difcourfe. The word *reflect* is ftated in Dr. *Johnfon's* dictionary as meaning, "4. to confider attentively;" and *reflection* is ftated from *Locke* to be, "the perception of the operations of our own minds within us, as they are employed about the ideas they have got." [Lord *Ellenborough* C. J. Though the meaning might have been more precifely expreffed, yet can there be any doubt of the true meaning, when it is ftated to be a "*libellous and fcandalous* paper, *reflecting* upon the juft rights and privileges of the houfe?" The injurious meaning is expreffed to a reafonable and common intent; which is fufficient.] Suppofing, then, that the publication of a paper of that defcription might have been deemed a breach of privilege, yet the warrant of commitment ftates no fuch breach; but it only ftates that the houfe had adjudged that Sir *F. B.*, who had *admitted* that the paper was printed by his authority, which the houfe had refolved to be libellous, &c. had been *thereby guilty* of a breach of privilege, &c.: thus making the plaintiff's *admiffion* of fuch a fact to be the breach of privilege; without alleging that he had committed the act complained of.

The Speaker, iffuing a warrant illegal in the frame of it, liable in trefpafs.

This action, it muft be obferved, is not brought againft the Speaker for an act done by him in parliament: the refolution of the houfe was an act done in parliament,

(a) Vide *Rex* v. *Airey*, 2 *Eaft's Rep* 30. It is fufficient if it be ftated in fubftance, that the pretences were falfe.

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for which no action would lie against any person for being a party to it: no member can be questioned for any thing said or done by him as such in the house: but this is for an act done out of the house, for which the Speaker is answerable, if the house had no authority to order him to issue a warrant of commitment in the particular case. But further, though the resolution of the house were sufficient to authorise him to issue a warrant for the commitment of the plaintiff; yet if the warrant actually issued were not legal and sufficient in the frame of it to warrant the arrest and imprisonment of the plaintiff, the Speaker would be answerable for the trespass complained of, in like manner as any magistrate would be, who, being authorized and directed by act of parliament to issue a warrant of apprehension against offenders in a certain case, issued it in an illegal form. In this respect this case differs from that of a mere ministerial officer executing a warrant legal in its frame, and issued by a court of competent jurisdiction: and this is the answer to a question put by one of the learned judges in a former part of the argument (*a*).

Peroration of the general argument.

Upon the whole therefore of this part of the argument, the plaintiff contends for the right and duty of the judges to take conusance of the privileges of parliament, when questions concerning those privileges are brought incidentally in judgment before the court in an action brought by a party complaining of the trespass and imprisonment which have ensued upon the alleged breach of them. That if no action of trespass for the imprisonment under a commitment would lie in a case of this sort, in order to put the persons who issued the warrant upon shewing a legal cause for such commitment, and a legal warrant to

(*a*) Ante, 65.

authorize

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authorize it; it would enable any body of persons, having power to commit for contempts, to punish as for a contempt whatever they might please to call such, and the party grieved by the undue exercise of such a power would be without remedy. That the right of maintaining such action, for the purpose of trying the legality of the commitment, is not disproved by the practice, which has prevailed in the courts, of refusing to examine into the question of privilege upon the return to the writ of habeas corpus, stating a breach of privilege as the cause of commitment; where the question of privilege arises *directly*, and where the exercising a power of discharge by the courts of law would lead to a clashing of jurisdiction. But that no detriment can ensue to the house of commons from the courts of law taking *incidental* conusance of the privileges of parliament, in the way of action; because any erroneous judgment they might pronounce would be liable to be corrected upon writ of error to the house of lords, who have the same interest as the commons in upholding all their legal privileges. That by laying the basis of parliamentary privileges in the law of the land, and subjecting them to the examination and control of the courts of law, no arbitrary and despotic power can be exercised, and no person can be deprived of his liberty, without ultimate redress, except by a law made or recognized by the whole body of parliament; whereby the one house may operate as a check upon the other, agreeably to the general principle of the constitution, which is composed of checks and balancing powers. In such a constitution it is of essential consequence that the legality of every act affecting the liberty of the subject should be open to the examination and trial of the courts of justice. Further, that no sufficient cause of commitment

appears

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appears to have exifted in fact; or if fo, that it is not diftinctly and certainly ftated in the warrant to juftify the commitment under it. That even if there were a juftifiable caufe for the refolution of the houfe, the Speaker iffuing his warrant founded on fuch refolution is anfwerable for any illegality or defect in the frame of the warrant, and that this warrant is defective in the ftatement of the imputed breach of privilege.

As to breaking the plaintiff's houfe, the outer door being fhut.

The only remaining point is as to the breaking of the plaintiff's houfe, the outer door being fhut; which arifes upon the firft juftification. The law, confidering every man's houfe as his caftle for his protection and defence, privileges it from being broken into for the purpofe of executing any procefs, or making any arreft, except where the king is a party. That appears by the year-book 13 *Ed.* 4. 9. *a.* (*a*). So Lord *Coke*, in 5 *Rep.* 91. *b.* 92. *a.* fays, that where the king is a party, the writ of itfelf is a non omittas propter aliquam libertatem, though it be not fo worded; and cites the fame year-book, "that for felony, or fufpicion of felony, the king's officer may break the houfe to apprehend the felon; and that for two reafons; 1ft, for the commonwealth; for it is for the commonwealth to apprehend felons. 2d, In every felony the king has intereft; and where the king has intereft, the writ is non omittas, &c.: and fo the liberty or privilege of a houfe doth not hold againft the king." And there is much more to the like purpofe, to fhew that outer-

(*a*) The paffage runs thus; "Et fuit tenus que pour felonie, ou pour fufpection de felonie, home poit debrufer meafon pour prendre le felon, car il eft pour le common weale de prendre eux. Et auxi Choke dit, que le roy ad intereft, le brief eft non omittas propter aliquam libertatem, &c.; iffint le libertie de fon meafon ne lui tiendra lieu, &c. Mes auter eft pour det ou trefpafs; le Vicont, ni auter, ne poit debrufer le meafon pour lui prendre; car ceo n'eft forfque particuler intereft del partie, &c." Vide 18 *Ed.* 4. 4.

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doors cannot be broken open even upon the king's writ, except it be for a crime; and not where it is in debt or trespass at the suit of a party. Lord *Coke* also appears (4 *Inst.* 176.) in his time to have considered that a justice of peace could not make a warrant, upon a bare surmise even of a crime, to break any man's house; as to search for a felon or for stolen goods, without an indictment found. There is no case where it has been held lawful to break open the door, except for some crime, and upon process at the suit of the king for that crime: for the law gives the privilege of defence to every man's castle, except against the king's process for crimes against the king's peace. But the same reason does not extend to a case like the present: for though the publication of a libel be indictable at the suit of the king, as tending, it is said, to a breach of the peace; yet the warrant issued in this case was not as for a breach of the peace; nor could the house have proceeded in this course for the publication of the paper merely quà libel, and as an offence at common law; but only as for a breach of their privilege, in publishing a paper injuriously reflecting on their rights and privileges; which is no crime against the king's peace, nor through him against the whole realm. Neither is there any necessity for resorting in this case to so violent a remedy as that of breaking into a man's castle, in order to seize his person there; for so long as he shuts himself up in it, no mischief or obstruction can be committed by him against the house of commons. It is a matter of general concern to the whole kingdom, that offenders against the king's peace should be brought to trial with all reasonable speed, and punished if found guilty; and it is the common practice to break doors in execution of the king's process against such offenders. But it will be extraordinary, if the subject be not enti-

titled

tled to the privilege and protection of his caſtle againſt a warrant of commitment for contempt, iſſued by the Speaker of the houſe of commons, that no caſe ſhould ever before have occurred, in which it has been attempted to execute ſuch a warrant by breaking into the party's houſe in order to arreſt him. 1811. BURDETT *againſt* ABBOT.

The further argument of the caſe was adjourned to *Eaſter* term; and on *Friday, May* 17th,

The Attorney-General was heard on the part of the defendant.—The plaintiff has had the benefit of every thing which learning and ingenuity, brought forward by the help of the greateſt diligence, could produce in his aid, and it is not the fault of his counſel that the authorities he has cited do not bear more effectually upon the true point of the caſe, nor break in upon any of the propoſitions neceſſary to be maintained on the part of the defendant. The very ſtatement of this caſe, without going at all into the argument derived from the long train of authorities cited, puts the plaintiff out of court. It is an action of treſpaſs brought againſt the Speaker of the houſe of commons for having, as he was ordered to do by the houſe, iſſued his warrants to the ſerjeant at arms, and to the keeper of the Tower; the one to arreſt and convey to the Tower, and the other to take and keep in cuſtody the plaintiff, who had been voted by the houſe to be guilty of a contempt and breach of privilege, for which they had condemned him to impriſonment in the Tower: it is therefore an action of treſpaſs againſt the officer of a court of competent juriſdiction, for having iſſued the proceſs of that court by its direction. No lawyer ever heard of ſuch an action maintained, or treated of as a *Argument for the defendant.*

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Bushell's case.

serious matter of doubt. *Bushell's* case is decisive against it: not that part which is to be found in Lord C. J. *Vaughan's* report, but the sequel of it in 1 *Mod.* 119. 184. *Bushell*, after he had been delivered out of custody by habeas corpus, and another person in the same situation, brought actions of trespass and false imprisonment against some of the commissioners of gaol delivery, and the recorder, by whom they were committed, and against the officers of the court who executed its process; and while these actions were depending, some of the defendants applied to this Court for time to plead. Lord *Hale* said at once, without doubt or hesitation: "I speak my mind plainly, that an action will not lie: "for a certiorari and a habeas corpus, whereby the body "and proceedings are removed, are in the nature of a "writ of error; and in the case of an erroneous judg-"ment given by a judge, which is reversed by a writ of "error, shall the party have an action of false imprison-"ment against the judge? No, nor against the officer "neither. The habeas corpus and writ of error, though "it doth make void the judgment, it doth not make "the awarding of the process void to that purpose; and "the matter was done in a course of justice. They will "have but a cold business of it. A habeas corpus and "certiorari is a writ of right, the highest writ the party "can bring. So a day was given to shew cause." The application for a discharge upon a writ of habeas corpus, is that upon which the party has a right to have a correct judgment given, as much as in any other case. It was not therefore correctly argued for the plaintiff, that though the Court refused to discharge a party upon habeas corpus, it did not follow that an action of trespass would not lie; and that though the

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prisoner were not entitled to his discharge upon the habeas corpus, yet that upon the same facts he might support an action of trespass. The converse of that proposition is true: in no case would trespass lie where the party would not be entitled to his discharge upon a habeas corpus; though it does not follow, that in every case where the party was entitled to his discharge upon the habeas corpus, an action of trespass would lie. A party may have been committed upon an erroneous judgment pronounced by a competent jurisdiction, and be entitled to be discharged on the writ of habeas corpus; but though the judgment might be erroneous, the process awarded thereon would not be void, nor would the officer who issued it by the direction of the court be deprived of the protection which that process gave him. This is a clear answer to the present action, and would be sufficient in any other than the present case to rest it upon: but as this answer, decisive as it is, would hardly satisfy the expectation of the Court upon such an occasion as the present, it is proper to examine shortly the arguments and authorities adduced on the part of the plaintiff, rather for the purpose of shewing how far the doctrines maintained on this occasion go, and how far they can be supported by the authorities, than for any interest which the defendant has in disputing any of them upon this occasion: for in truth they have little or no bearing upon the case in judgment. It would have been sufficient otherwise to have stated a few short propositions, which, being established in the mind of every lawyer, need no authorities to support them. As that the house of commons have a right to commit persons for contempts in breach of their privi-

 leges:

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leges: that they are the judges of thofe privileges, and whether or not they have been violated in the particular inftance: that their decifions upon that fubject, upon cafes brought directly before them, cannot be queftioned in any other court: that it is neither proper nor decent to object to this kind of jurifdiction in the houfe, by faying that they may abufe the power by committing perfons on falfe or frivolous pretences: it is not to be prefumed that thofe to whom the conftitution has entrufted fuch a privilege will fo abufe it: it is moft unwife to ftate it with a view to the general adminiftration of juftice; becaufe it is an objection that may be equally raifed againft any jurifdiction of the fame fort that may exift in any man or body of men in this country; againft the courts of juftice as well as againft the houfes of parliament. If an eftate be given to a man for his life and no longer, and an ejectment be brought for that eftate, in which the queftion is, whether that be an eftate for life, or in fee; it is poffible that the court in which that action is brought may decide that it is an eftate in fee; and it cannot be prevented, if the Court were determined fo to do; and if the party aggrieved brought a writ of error, the court of exchequer chamber may, if they pleafe, decide the fame, and fo may the houfe of lords, alfo, in the laft refort: but each of thofe courts would, notwithftanding, be juftified in committing any perfon who ftated that they were ignorant or profligate enough to come to fuch a decifion. In a matter of fuch general notoriety, it is fufficient to ftate that this right exifts in the houfe of commons. But if the houfe were not the fole and ultimate judge of its own privileges, the Speaker would ftill ftand defended in this cafe; for did any man who has the flighteft pretence to information ever doubt that

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that the house of commons has a right to commit any one who insults their proceedings while pending before them, and who causes a libel to be printed and published, reflecting upon and impeaching the integrity and justice of those proceedings. The mere denial by certain persons of these privileges of the house of commons cannot throw any doubt upon them: nor can it be necessary to carry the Court through a train of reasoning that is common and trite, and known to every man before he ventures to call himself even a student at law. If it were necessary, it would be easy to shew that every court in *Westminster-hall* has the same power of commitment for contempts, and that they could not exist long without such a power. It would have been easy to borrow from Lord C. J. *Wilmot*, the reasons so forcibly urged by him to that purpose in the admirable argument he had prepared for judgment in the case of *The King* v. *Almon* (*a*). It would have been shewn, that though the exercise of that power may be withheld, or but seldom exerted, yet if it were once established that the power itself did not exist in the courts, all the mischief that can arise from scandalizing them would be produced, and felt immediately and constantly. If it were certainly known that a man might invent and publish libels upon courts of justice for any matters done by them which displeased him, and that he would be free from punishment till the tardy process of the law, (for so it may be called on such an occasion,) in its ordinary course of proceeding by indictment, could reach him, men would be found daring enough to hazard the event of that distant day, and to offer to courts

(*a*) *Wilmot's Rep.* 243—254. &c.

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of justice those insults, which in the present day there is difficulty enough to restrain, notwithstanding all the guards by which they are surrounded. If then the right exist in the courts of *Westminster-hall*, upon what principle, it might then have been asked, could it be contended that the same right did not exist, and in the same degree, in the house of commons? Is there less danger to the constitution in suffering persons to scandalize and defame the members of the house of commons for their proceedings in parliament, than to scandalize and defame the judges for the exercise of their duties in courts? Is that assembly less open to insults? Does the history of our own times inform us that, though it may be necessary to surround the courts of justice with these guards, it is not necessary to protect the house of commons in the same manner? and can it be collected from the recorded wisdom of our ancestors, that they have left the house of commons alone thus defenceless? On the contrary it will be found, that there is not a text writer upon the subject, there is not an historian, who does not inform us, that this power has been constantly stated and admitted to reside in the house of commons (*a*). Lord *Coke*

(*a*) It is curious to observe what Mr. *Prynne*, whose partiality to the popular side will not be disputed, says upon this subject, in his treatise of the sovereign power of parliaments and kingdoms; which was printed in 1643 by order of the committee of the house of commons concerning printing, after the commencement of the civil war: as such, therefore, I quote it, more for its curiosity than its authority. Part 4. page 26. "Secondly, for the parliament's imprisoning of men pretended to be against *Magna Charta*, I answer, first, that the parliament is not within that or any other law against imprisonments, as I have formerly cleared; therefore is not obliged by it, nor can offend against it. Secondly, that it hath power to imprison and restrain the greatest members of their own houses, though privileged men exempt from all other arrests, and public persons representing those that sent them thither; therefore much more may they imprison or restrain any other private

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Coke (*a*) confiders the houfe of commons as a court of judicature, having power to commit. The houfe has in in fact always claimed and exercifed the right to commit members and others for a breach of their privileges. This appears by the journals of the houfe; and from the earlieft period at which they are printed, down to the time of the Commonwealth, from thence to the Revolution, and again from the Revolution to the prefent time, numberlefs inftances have been found, in which the houfe of commons have committed offenders of this defcription. It is ufelefs to detail the bead-roll of inftances which are generally known, and are to be found in the appendix to the report of the committee of the houfe of commons (*b*): fo that it is impoffible to controvert the practice.

This right, then, being eftablifhed upon authority, upon principles, and upon practice, there is nothing left to do, but to follow the very learned and ingenious argument for the plaintiff, and confider how it bears

(*a*) 4 *Inft.* 23. (*b*) See alfo a collection of precedents publifhed by Mr. *Wynne* in 1810.

private perfons, notwithftanding *Magna Charta.* And the parliament being the fupremeft judicature paramount all other courts, their commitments cannot be legally queftioned, determined, nor their prifoners releafed by habeas corpus in or by any other inferior court or judicature whatfoever." I will only refer further to one modern book, 7 *T. Rep.* 741. for what was faid by one of the greateft lawyers and judges of late times in the cafe of *The King* v. *Defpard.* " I remember (faid Lord *Kenyon*) when a doubt was made whether or not the houfe of commons had the power of committing to prifon. On that occafion a gentleman of great character and fortune, Sir *John Phillips*, who had retired from the bar, appeared in this court for the purpofe of moving that the perfon who had been committed by the houfe might be difcharged. The Court heard him patiently, and the public, perhaps, were gratified with hearing the queftion difcuffed: and though the motion was unfuccefsful, I believe the public were fatisfied that juftice was properly adminiftered. Many other cafes of this kind have been agitated in this court, where they have met the fame fate." The cafe alluded to was probably *Murray*'s cafe, which is ftated in 2 *Wilf.* 299. to have been moved by Sir *John Phillips.*

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As to the distinction where the question of privilege comes directly or incidentally before the Court.

upon the present case. Authorities were cited to shew that the courts of law have a right to decide in certain cases upon the privileges of parliament; which is true, and has never been questioned in any of the instances cited. But it does not follow, that because they have a right in some cases, they have a right in all: and accordingly the plaintiff's counsel, in the result, stated the right of the courts of law to decide upon the privileges of parliament with this qualification, where the question of privilege arises *incidentally*; and with that qualification the proposition may be admitted. No doubt, that in many cases, if the point have not been directly decided in parliament, and it be not ascertained what the privileges of parliament are, the courts of law, from the necessity of the case, must decide the question when brought judicially before them: for how else can such cases be disposed of. Take, for instance, the case of *Benyon* v. *Evelyn*, so much referred to. An action was brought for goods sold and delivered: the defendant pleaded the statute of limitations: the plaintiff replied, that he could not sue the defendant sooner, because he was a member of parliament, and privileged from suits: the defendant denied that position, and said that, though members of parliament cannot be arrested, they may be sued. Then the question between them was, whether members of parliament could be sued or not during the sitting of parliament; because if they could, the action might have been maintained. The Court there were obliged to determine the question; and they did determine it; lamenting, however, that necessity. Lord C. J. *Bridgman* upon that occasion says: "When in a common action the privilege of parliament doth come to be part of the plea or justification, it is of necessity that the privilege, whether

Benyon v. *Evelyn*.

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there be ſuch, and what the extent of it is, come alſo into conſideration. For, as in the regiſter it is ſaid of the eccleſiaſtical court, which is inferior to the common law, if a common law point come in queſtion there, non eſt conſonum rationi quod cognitio acceſſarii in cauſâ chriſtianitatis impediatur, ubi cognitio cauſæ principalis ad forum eccleſiaſticum noſcitur pertinere: ſo I may ſay here, the privilege of parliament coming in incidentally as part of the caſe, as a conſequent, muſt in this particular caſe be alſo debated here." Unqueſtionably it muſt, becauſe otherwiſe it would be impoſſible for the caſe to be decided. But after citing caſes to ſhew that where the queſtion of privilege comes before the Court *incidentally*, they muſt decide it, the plaintiff's argument ſtopped ſhort, and omitted to ſhew how the queſtion of privilege ariſes *incidentally* in this caſe. On the contrary, if a caſe were to be invented to ſhew where the queſtion of privilege ariſes *directly*, it would be this very caſe. For here was a direct judgment of the Houſe of Commons that the plaintiff had been guilty of a breach of their privileges, and that he ſhould be impriſoned in the Tower for that breach: there is an order thereupon given to the Speaker to iſſue his warrant for the plaintiff to be committed to the Tower; and a warrant iſſued in conſequence; which is executed: then follows this action of treſpaſs brought againſt the Speaker who iſſued the warrant in obedience to the orders of the Houſe. Can any caſe be imagined in which the queſtion of privilege can come more *directly* before the Court than in this? Has not the direct point now brought in queſtion before this court been already decided by the Houſe of Commons; and is not the court, by the ſhape of the argument, called upon to determine that, in this particular inſtance of the

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exercise of their privileges, the House have decided wrong? The Court must say so, if the action be held to lie. But, with great deference to the Court, they have no jurisdiction so to decide; it was for the House of Commons to determine whether their own privileges had or had not been violated: they have determined it directly, and have punished the plaintiff for such violation accordingly; and it is against one of those who have carried that judgment of a competent jurisdiction into execution that this action is brought: and unless this Court decides that it has a right to inquire in such a case whether the House has properly or improperly imprisoned the offender, and to reverse its judgment in effect, by declaring that the Speaker has himself transgressed in obeying the order of the House, and that it was his duty to refuse to issue his warrant upon such order, judgment cannot be given for the plaintiff. The plainness of a case sometimes renders it the more difficult to argue it, because the adversary's objections are answered in the mere statement of them.

As to the habeas corpus cases.

It was said, that the class of cases, in which the courts had refused to liberate on habeas corpus persons committed for breaches of privilege, furnished no authority for saying that an action of trespass could not be maintained against the officer who had executed the parliamentary process, if the commitment could be shewn to be without authority. But surely the remanding of the party committed, brought before the court upon habeas corpus; though it do not conclude him from further applications for his liberation to every court in *Westminster-hall*, upon habeas corpus; or even from calling for their judgment upon the same question in an action of trespass; is decisive to shew that, in the judgment of the remanding court at least, an action of trespass could not be supported in the particular case: for if upon

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the return it appeared that he was not in custody by a lawful authority, it would be the duty of the court to deliver him. Though if they did liberate him, it would not necessarily follow that an action of trespass could be maintained against the officer. It is impossible that the language of Ld. C. J. *Vaughan* in *Bushell*'s case (*a*) should be understood in the large sense attributed to it; that in every return to a habeas corpus, the Court to whom the return is made should see the cause of commitment as plainly as the committing Court saw it: the contradiction of it may be found in *Bushell*'s case itself, and in the authorities there cited. One of those is *Apsley*'s case (*b*), who is stated to have been committed to the *Fleet* by the Court of Chancery for a contempt, and liberated upon habeas corpus brought. What the circumstances of that case were do not appear, but reference is there made to the case of one *Allen*; where the return to the habeas corpus was that the Lord Chancellor, *Heselmere*, had committed *Allen* for a contempt in disobeying a decree of the Court of Chancery: which was held to be sufficient; and the Court refused to deliver him: yet it cannot be said that, upon such a return, the Court to which the appeal was made saw the cause of commitment in all its circumstances as plainly as the Court which committed him; for the latter alone knew the decree which was disobeyed, and whether the case was within their jurisdiction, and being so, whether the facts justified it. *Bushell*'s case was not a commitment for a contempt; it was a commitment of a jury, because they did not find a verdict according to the evidence of the fact and the direction of the Court: and Lord C. J. *Vaughan* is mistaken in supposing that it was the first instance of the

Bushell's case. *Allen's case.* *Bushell's case.*

(*a*) *Vaugh.* 137. (*b*) *Moore*, 840.

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Aylesbury case.

commitment of a jury for returning a verdict against the evidence: an instance of the same kind occurred in Sir *Nicholas Throckmorton*'s case (*a*). The *Aylesbury* case (*b*) created great interest at the time, and some degree

(*a*) 1 *St. Tr.* 77, 8.

(*b*) The report of Lord *Raymond*, 2 vol. 1105. is of what passed on the return to the habeas corpus before the court of Queen's Bench, in *Hil.* 3 *Anne.* But it appears from a MS. of Mr Baron *Price*, that on the 18th and 19th of *January* 1704, Lord Keeper *Wright* summoned all the Judges to attend him for their opinions; having been served with two petitions for writs of habeas corpus by *J. Paton* and another, two of the five *Aylesbury* men, who were committed on the 5th of *December* 1704, by warrant of Mr. Speaker *Harley*, by virtue of an order of the house of commons of the same date, for bringing actions against the late constables of *Aylesbury*, for refusing their votes in the election there for members of parliament. Application had also been made to several of the judges for writs of habeas corpus upon the same occasion. The MS. also contains the minutes of another conference of the Judges, held on the same occasion, on the 8th of *February*, at *Serjeants' Inn*, by the desire of Lord C. J. *Holt* and the other Judges of the Queen's Bench. The habeas corpus applied for on this occasion was not upon the statute, but at common law. The prisoners were all remanded. By the same MS it appears that after the decision of the court of Queen's Bench upon the writ of habeas corpus sued by *Paty*, (reported in 2 *Ld. Ray.* 1105.) by which he was remanded, of which a special entry was made of record, quod cognitio causæ captionis et detentionis prædicti *Johannis Paty* non pertinet ad curiam dictæ dominæ reginæ coram ipsâ reginâ, ideo idem *Johannes*, remittitur, &c.; *Paty* petitioned the Queen to grant him a writ of error returnable in parliament. The Queen referred it to the attorney and solicitor-general, and afterwards to all the judges, who met on the 21st of *Feb.* 1704 at *Serjeants'-Inn*, whether the Queen ought to grant the writ of error of right, or ex debito vel merito justitiæ, or ex gratiâ. After debate of the question, it appears that of the twelve judges who met at that time, *Holt* C. J., *Trevor* C. J., *Ward* C. B., and *Blencowe*, *Powis*, and *Tracy*, Justices, were of opinion, that the writ of error was a writ of right in this case, and that the Queen ex debito justitiæ ought to grant it; and that *Nevill*, *Powell*, and *Gold*, Justices, and *Bury*, *Price*, and *Smith*, Barons, held that the writ of error was of grace and favour, and not of right: but *Nevill*, *Powell*, *Gold*, and *Bury* afterwards changed their opinion, and agreed with the first six: and on the 24th of *February* 1704 these certificates were returned.

" May it please your majesty,

In obedience to your majesty's command we have considered of the petition hereunto annexed; and we are humbly of opinion that a writ of error in this case ought to be granted of right, and not of grace. But we give

gree of heat paſſed into the diſcuſſion of it: there was probably as great a diviſion in opinion, whether in fact what was done was a breach of the privilege of the houſe of commons, as upon any other occaſion that has occurred. It is important, therefore, to obſerve the courſe which the leading ſtateſmen and great lawyers of that time took for the purpoſe of bringing it to the deciſion of a court of law: they brought writ after writ of habeas corpus, and had the judgment of all the judges upon it: but no where is it hinted that, although the party might not be entitled to his diſcharge upon the habeas corpus, he was ſtill entitled to maintain an action of treſpaſs. Yet that cauſe was not in the hands of perſons who were likely to overlook that material conſideration for their clients; nor was it likely, even in a pub-

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give no opinion whether a writ of error does lie in this caſe, becauſe it is proper to be determined in parliament, where the writ of error and record are returned and certified.

HOLT.	POWIS.
TREVOR.	BLENCOWE.
WARD.	GOLD.
NEVILL.	TRACEY.
POWELL.	BURY."

"May it pleaſe your majeſty,

In obedience to your majeſty's command we have conſidered of the petition hereunto annexed; and we are humbly of opinion that your majeſty is not of right and juſtice obliged to grant a writ of error in this caſe.

PRICE.
SMITH."

The judges all attended the Queen at the cabinet on the 25th of *February*, and delivered theſe their ſeveral reſolutions to her majeſty in the preſence of the Prince, and many of the principal members of the council. But finally, in conſequence of a diſagreement growing between the two houſes of parliament upon this ſubject, the Queen, in anſwer to an addreſs from the houſe of lords for granting a writ of error, ſaid that ſhe ſhould have granted the writ of error deſired in the addreſs, but finding an abſolute neceſſity of putting an immediate end to the ſeſſion, ſhe was ſenſible that there could have been no further proceeding upon the matter: and the parliament was prorogued to the 1ſt of *May* 1705.

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lic view of the cafe, that they fhould have overlooked any thing that might have embarraffed their adverfaries fo much: and it is difficult to believe, after looking through every judgment that has been pronounced, every argument urged, and every debate that has been brought forward in both houfes of parliament, upon that fubject, that if there were any colour for the propofition, that notwithftanding a refufal to liberate upon habeas corpus, an action of trefpafs might ftill be maintained, fome intimation of fuch an opinion fhould not be found in the reports, parliamentary or legal, of thofe and fubfequent times; more efpecially when it is recollected, that that controverfy lafted for fome time, and that a fufficient period for confideration intervened between that cafe and the cafe of *Murray*, and between the fubfequent cafes of *Crofby* and *Flower*.

Cafes of Crofby and Oliver.

In the cafes of *Crofby* and *Oliver*, the queftion was tried by habeas corpus, brought by one of the perfons committed in the Court of Common Pleas, and by another in the court of Exchequer. Mr. Serjeant *Glynn* was the advifer and conductor of thofe proceedings: and recollecting the hiftory of thofe times, it was not likely, that if any ingenuity could have prevailed over thofe who imprifoned *Crofby* and *Oliver*, it would have been wanting: but in none of the arguments ufed upon that occafion, nor in any of the judgments pronounced in each of the courts, is there the fmalleft intimation that, though the parties were remanded, ftill they could maintain trefpafs. But what is moft fatisfactory upon this point is that the prayer of the habeas corpus being refufed in different courts of *Weftminfter-hall*, no action of trefpafs was ever brought, upon which, if the judgment of the court of common law were erroneous, the record might have

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have been carried to the Houſe of Lords: and therefore there can be no doubt but that, in the opinions of the very able and zealous men of that day, the judgments of the Courts upon the writs of habeas corpus were conſidered as having decided that actions of treſpaſs would not lie: in other words, that the Courts, refuſing to deliver the parties upon the habeas corpus writs, muſt have been of opinion, that thoſe who impriſoned them had not been guilty of treſpaſs. The caſes in which theſe queſtions have come directly before the Court occurred moſtly in times of violence, when ſuch acts were exerciſed as gave riſe to *Buſhell's* caſe, and were repreſſed by that judgment; and which never have been mentioned ſince but with reprobation. The diſtinction between the province of the Court and jury is now too well eſtabliſhed, and the principles of liberty are too well underſtood, to ſubject juries acting in the conſcientious diſcharge of their duties to any ſuch danger. Lord *Shafteſbury's* caſe (*a*) was the firſt experiment made in the courts of law upon the legality of theſe commitments for breach of privilege. He was brought up by habeas corpus before this Court, having been committed by a warrant as for a contempt of the Houſe of Lords. Sir *Thomas Jones* J. ſaid: "The courſe of all courts ought to be conſidered; for that is the law of the court; *Lane's* caſe, 2 *Rep.* 16. and it hath not been affirmed that the uſage of the Houſe of Lords hath been to expreſs the matter more punctually on commitments for contempts, and therefore I ſhall take it to be according to the courſe of parliament." *Wilde* J. ſaid; "the return no doubt is illegal: [he muſt have meant in a common caſe:] but the queſtion is on a point of juriſdiction, whether it may be examined

Ld. Shafteſbury's caſe.

(*a*) 2 *St. Tr.* 615 612. 1 *Mod.* 144.

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here. This Court cannot intermeddle with the transactions of the high court of peers in parliament during the session which is not determined; and therefore the certainty or uncertainty of the return is not material; [by which he must have meant the certainty or uncertainty of the contempt for which the party was committed;] for it is not examinable here." *Rainsford* C. J. said: "This Court have no jurisdiction of the cause, and therefore the form of the return is not considerable." *Twisden* J. was absent, but desired *Jones* J. to declare his opinion, that the party ought to be remanded. Sir *Thomas Jones* J. further said, "that where the courts of *Westminster* have taken cognizance of privilege, it has been only *an incident to the cause* before them; but in that case *the direct point* of the matter was the judgment of the Lords." To apply that doctrine to the present case: it was admitted there, as it is here, that privilege may be enquired into where it is an incident in the cause; and it was not enquired into in the case of Lord *Shaftesbury*, because it was not an incident, but was the direct point in the case before the Court. [Lord *Ellenborough* C. J. What distinction do you take between a direct and an incidental question of privilege. I take the question of privilege to come directly in judgment before the Court, upon an application for the party's discharge upon habeas corpus.] If upon the trial of an ejectment to recover an estate, a question arose upon the validity of a marriage; and the legitimacy and right of the claimant depended upon the legality of that marriage; the Court must decide that question, (though properly a question of ecclesiastical conusance,) because it arises before them collaterally. The direct point in that case is, whether the party claiming be entitled to the estate: which depends on the colla-

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teral point, whether the marriage between *A.* and *B.*, from whom he claims title by descent, be a legal one. The Court must of necessity decide that question which arises thus collaterally: and perhaps *collaterally* would be a more correct term than *incidentally*. But suppose *A.* and *B.* had been cited into the Ecclesiastical Court for cohabiting together, without being legally married; and the Ecclesiastical Court pronounced the marriage void, and directed the writ de excommunicato capiendo to be issued thereupon; and suppose the party to be taken, and an action brought by him against the officer for the execution of that writ: there the question of the legality of the marriage having been directly decided by the Court to which the decision of it belonged, and not merely collaterally; the judgment of the Ecclesiastical Court would be conclusive in favour of the defendant in such action, who had only acted in execution of the judgment of a court of competent jurisdiction. The justification runs back in a direct line from the act complained of to the judgment of the Ecclesiastical Court; the one springs out of the other, and the two are connected together. But in the case of the ejectment, where the same question might arise, there is no judgment in the Ecclesiastical Court connected with the immediate cause of action in the Court of common law: the question of marriage may be said therefore to arise incidentally or collaterally, and the Court of common law are obliged to decide upon it with such lights as they can get, lest the principal cause, the title to the estate, should stop for want of such previous decision. In like manner the Christian Courts must sometimes decide questions of common law: not that they pretend to be competent to decide them; but because, without

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ſuch deciſion, the principal cauſe, which is within their proper juriſdiction, would ſtand ſtill. So the Common law Courts are often under the neceſſity of expounding the law of foreign countries, where that may become neceſſary in the progreſs of a cauſe of which they have juriſdiction. [Lord *Ellenborough* C. J. The queſtion may be ſaid to ariſe directly, where it is the direct and immediate fruit of the judgment of the other Court, which has excluſively the power to pronounce upon it.] The only reaſon for uſing the word "*incidentally*" is becauſe it is to be found in former caſes upon this ſubject.

Aylſbury caſe, Reg. v. Paty and Others.

The caſe of *The Queen* v. *Paty and Others* (*a*) gave riſe to much heated diſcuſſion, upon the queſtion, whether or not the Houſe of Commons had acted correctly in determining, that an action brought againſt a returning officer for having rejected votes at an election was a breach of privilege. The Houſe having committed thoſe who were concerned in bringing the action, they ſued out writs of habeas corpus; to which the warrant of commitment iſſued by the Speaker was returned; ſtating, "that by virtue of an order of the Houſe of Commons, &c. theſe are to require you forthwith, upon ſight thereof, to receive into your cuſtody the body of *John Paty*, who, as it appears to the Houſe of Commons, *is guilty of commencing and proſecuting an action at common law againſt the late conſtables of Aylſbury, for not allowing his vote in the election of members* to ſerve in parliament; contrary to the declaration, in high contempt of the juriſdiction, and in breach of the known privileges of this Houſe," &c. The queſtion in effect was whether this warrant upon the face of it ſtated a legal cauſe of commitment.

(*a*) 2 *Ld. Ray*. 1105.

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Lord *Holt* certainly was of opinion that it did not; for that the profecuting of the action being in itfelf a legal act, and the right of the fubject, could not be a breach of privilege; and confequently that the party ought to be difcharged. But the eleven other judges were of a different opinion; and, as Mr. Juftice *Blackftone* faid in *Crofby*'s cafe (*a*), "we muft be guided by the eleven, and not by the fingle one." The eleven judges were of opinion, that the Court had nothing to do with the confideration, whether or not it was a contempt of the Houfe of Commons; the Houfe having determined it to be fo, they were bound to give credence to that determination: and the party was accordingly remanded. Without going through the whole of the judgment in *Paty*'s cafe, it is fufficient to refer to what was there faid by one of the judges, a very eminent man, Mr. Juftice *John Powell*. He obferved, that it was the firft caufe of the kind that had been before that court, and differed from Lord *Shaftefbury*'s cafe, becaufe he was a member of the houfe of peers, and they might have other powers over their own members than they had over their fellow fubjects without doors. He faid, "the Court cannot judge of the return; firft, becaufe they were committed by another law, and confequently we cannot difcharge them by that law by which they were not committed." Now that is perfectly correct; they had been committed by another law, that is by the law of parliament; and thofe who were the primary judges of the law of parliament had determined that they had been guilty of a breach of privilege. He fays, "There is a lex parliamenti; for the common law is not the only

(*a*) 3 *Wilf.* 205.

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law in this kingdom; and the House of Commons do not commit men by the common law, but by the law of parliament. The House of Lords have a power of judicature by the common law upon writs of error, but they cannot proceed originally in any cause. But they proceed too in another manner in the case of their own privileges; and therein the judges do not assist, as they do upon writs of error; and their proceeding in that case is by the lex parliamenti. So the Commons have also a power of judicature, and so is 4 *Inst.* 23.; but that is not by the common law, but by the law of parliament, to determine their own privileges: and it is by this law that these persons are committed. This Court may judge of privilege, but not contrary to the judgment of the House of Commons; which yet we must do in this case if we discharge these persons from their imprisonment; which is the only judgment the House of Commons can give upon their determination that these persons have been guilty of a breach of their privileges." Pursuing, then, the reason of Mr. Justice *John Powell*; how can this court determine that this action of trespass is maintainable against the officer who executed the process of the House of Commons; without determining, that the house acted wrong in coming to that resolution, and issuing that process. "This (he says) is drawing the plea ad aliud examen; and yet the House of Commons are the supreme judges of their own privileges. This Court judges of privilege only *incidentally*; and so it did in *Benyon*'s case, and in the case of *Ashby* v. *White*: for when an action is brought in this court, judgment must be given one way or other." That is the reason why the Court must decide upon questions of privilege. Then he proceeds to exemplify it by saying;

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"So they do in ecclefiaftical matters, when a queftion of that nature arifes in an action brought before them; as in the cafe of the quaker's marriage depending in the Court of Common Pleas: but their judgment will not bind the Ecclefiaftical Court: and therefore if fuch a marriage fhould be adjudged at law to be a good marriage, and yet afterwards the parties fhould be cited into the Ecclefiaftical Court for living in fornication, and excommunicated, and taken upon the capias excommunicatum, this Court could not difcharge them upon a habeas corpus. So here the Court of Parliament, he faid, was a fuperior court to this Court; and though the King's Bench have a power to prevent exceffes of jurifdiction in courts, yet they cannot prevent fuch exceffes in Parliament; becaufe that is a fuperior court to them, and a prohibition was never moved for to the Parliament," &c. That is an exprefs authority, that where a party is committed by the Houfe of Commons for a contempt in a breach of their privileges, and is brought before this Court upon a habeas corpus, this Court will not enquire whether he has been guilty of a breach of privilege or not; but the Court will fay, that the decifion of that queftion does not belong to them; the neceffity of deciding it does not exift; and that having been already decided in the very cafe by more competent judges of the fubject, this Court cannot re-confider their judgment; but prefuming it to be right, and that they have proceeded in the legal courfe; this Court cannot undertake to fay that that which was done in the execution of a judgment pronounced by a competent authority was illegal, becaufe they might be of opinion that the original judgment was wrong; inafmuch as the matter of that judgment belonged to the Houfe, and not to this

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court, and they were bound conclusively by that judgment upon the very point. The Court recollects the manner in which the House of Commons proceeded against Lord Chief Justice *Pemberton*, and the other judges of this court (*a*). But without entering into the discussion,

(*a*) This alludes to proceedings in the House of Commons in 1689, 1 *Wil.* & *Mary*, against the judges of *K. B.* upon occasion of a judgment given by them so long before as in *Easter* term 34 *Car.* 2. in an action of trespass brought by one *Jay* against *Topham*, the Serjeant at arms of the House, for arresting and imprisoning the plaintiff To which the defendant pleaded an order of the House for arresting *Jay* and bringing him to the bar, by virtue of which the defendant took and detained him for that purpose: and this was pleaded to the jurisdiction of the Court, instead of being pleaded in bar to the action. On which there was a demurrer; and the Court adjudged that the defendant should answer over on account of the informality of the plea. This in substance is the account given of the proceeding by Lord C. J. *Pemberton*, when summoned with the other judges of the court before the House of Commons to answer for their conduct on that occasion; as it may be collected from the Journals, and 8 *St. Tr.* 2. But as there is no account of the pleadings in that case in print, I have subjoined so much of them as is material from a copy of the record, with which I have been furnished. The record is intitled of *Hil.* 33 & 34 *Car.* 2. in *B. R. Rot.* 1165. The declaration is in the common form by *John Jay* against *John Topham*, for a trespass, assault, and false imprisonment, *and detaining him in custody for* 10 *days*, *until the plaintiff paid* 30*l for his liberation.*

Plea.—Et prædictus *Johannes Topham* per R. G. attornatum suum venit, et defendit vim et injuriam, et dicit quod curia dicti domini regis nunc hic cognitionem placiti prædicti habere non debet; quia dicit, quod ad parliamentum domini regis inchoatum et tentum apud *Westm.* &c. ipse idem *Johannes Topham* fuit Serviens ad arma legitime constitutus, et attendens milites, cives, et burgenses parliamenti prædicti in parliamento illo tunc assemblatos, scilicet apud *Westm.* &c. quodque ipso prædicto *Johanne* sic Serviente ad arma existente, per milites, cives, et burgenses prædictos in parliamento prædicto in Domo Communium ejusdem parliamenti sic assemblatos, ordinatum et præceptum fuit ipso prædicto *Johanni Topham*, secundum legem et consuetudinem parliamenti, quod ipse prædictus *Johannes Topham* prædictum *Johannem Jay* adduceret ad barram domûs illius in custodiâ ipsius *Johannis Topham*; virtute cujus quidem ordinis et præcepti, durante sessione parliamenti prædicti, ipse idem *Johannes Topham* prædictum *Johannem Jay* cepit et detinuit ad adducendum ipsum *Johannem Jay* ad barram prædicti Domûs Communium prædictorum; quæ quidem captio et detentio ex causâ prædictâ est eadem insultus, captio, et imprisonamentum prædicti *Johannis Jay* in narratione prædictâ superius

discussion, whether the plea in that case was to the jurisdiction, or in bar; (for whatever it was called, it must have operated, if at all, as a plea in bar;) that case shews what

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superius fieri supposita: ideoque materia illa per milites, cives, et burgenses parliamenti in parliamento assemblatos, et non alibi, examinari et determinari debet. Et hoc paratus est verificare. Unde non intendit quod curia dicti domini regis nunc hoc placitum prædictum ulterius cognoscere velit aut debeat, &c

To this plea the plaintiff demurred.—Et prædictus *Johannes Jay* dicit, quod pro aliquâ per prædictum *Johannem Topham* præallegatâ, curia dicti domini regis nunc hic cognitionem placiti prædicti habendi precludi non debet; quia dicit quod placitum prædictum per ipsum *J. Topham* modo et formâ prædictis placitatum, materiaque in eodem contenta minus sufficientia in lege existunt ad curiam dicti domini regis nunc hic a cognitionem placiti prædicti habendo precludendum: ad quod quidem placitum modo et formâ prædictis placitatum necesse non habet, nec per legem terræ tenetur aliquo modo respondere. Et hoc paratus est verificare. Unde pro defectu sufficientis responsi in hac parte, ipse idem *Johannes Jay* petit judicium, et quod curia dicti domini regis nunc hic placitum prædictum ulterius cognoscere vellet, et quod idem *Johannes Topham* ad billam prædictam ulterius respondeat, &c. Et pro causis morationis in lege super placito illo, idem *Johannes Jay*, juxta formam statuti, &c. ostendit, et curiæ hic demonstrat, has causas subsequentes, vid[t]., eo quod placitum prædictum superius placitatum *ad jurisdictionem curiæ domini regis nunc hic non est placitabile post plenam defensionem factum*: ac quod placitum illud et totaliter insufficiens *et minime respondet ad totas materias* in narratione prædictâ superius specificatas; et caret substantiâ et formâ, &c.

The joinder in demurrer is in the common form, insisting upon the sufficiency of the plea.

Sed quia Curia dicti domini regis nunc hic de judicio suo de et super premissis reddendo nondum advisatur, &c. a future day is given to the parties: and there the roll in this cause ends.

In the next term, viz. *Easter*, 35 *Car.* 2. *Rol.* 101. there is an entry of a declaration of *Jay* against *Topham*, for 30*l.* money had and received: to which *Topham* pleaded the general issue; but no further proceedings in this cause are stated. It is observable that *Topham*'s plea to the first declaration takes no notice of the charge of continuing the plaintiff in custody till payment of the 30*l.*; to which the latter part of the demurrer evidently applies. This is alluded to by Lord C. J. *Pemberton* in assigning the reasons of his judgment to the House of Commons. "If (says he) Mr. *Topham* had abused his authority, and done any outrageous thing; if, when he had an order to bring a member to the bar of this house, he had kept him extravagantly, and not brought him thither, but exacted money of him: if the case in fact were so; it is certain he ought

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what the opinion of the judges of this Court then was upon that fubject; though they fturdily refufed to recede from the judgment they had pronounced, and chofe rather to fuffer imprifonment than to apologife for doing that which they thought right. But Lord C. J. *Pemberton* faid upon that occafion; "It is allowed by all people living, I think no judge ever denied it, that the order of this houfe was fufficient to take any one into cuftody: no judge, I prefume, ever thought otherwife. But if this be pleaded to the jurifdiction here, the hands of the Court are clofed; fo that whether he had fuch an order or not is not to be enquired of by the Court. But if it be pleaded in bar fo, it is a good bar; and he will have as much advantage as any; and all people muft allow it is a good bar. Therefore I would pray you (the houfe), that you would confider that in this cafe, here is nothing of your privileges, nothing of the jurifdiction of this court, is called in queftion, but only the manner of making ufe of it."

[Lord *Ellenborough* C. J. It is furprizing upon looking at the record in that cafe, how a judge fhould have been queftioned, and committed to prifon by the Houfe of Commons, for having given a judgment, which no judge who ever fat in this place could differ from. The plea there began as a plea in bar, and concluded in abatement. There was a fpecial demurrer, too, alleging for caufe, that the plea did not anfwer the whole matter of the declaration. I do not fee how any judge, fitting in judgment upon a record fo framed, could poffibly have given any other judgment than the Court gave in that

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ought to have been punifhed, and to return damages to the perfon injured." Sir *Thomas Jones* fpoke more precifely to this point in the paffage afterwards cited by the *Attorney-General*.

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case. But you are not interested in defending that commitment. *The Attorney-General* observed, that probably the matter was not so well understood at that time. Lord *Ellenborough* C. J. It was after the Revolution, which makes such a commitment for such a cause a little alarming. It must be recollected, that Lord C. J. *Pemberton* stood under the disadvantage, at that period, of having been one of the judges who had sat on the trial of Lord *Russel* (*a*), and therefore did not stand high in popularity after the Revolution, when the judgment and attainder in his case had been recently reversed by parliament (*b*). I would not, however, have it for a moment supposed, that I cast the least reflection upon Lord C. J. *Pemberton* for his conduct in court upon that trial. He was a man of eminent learning; and being no favourite of either party at that time, for he was shortly after that trial removed from his situation (*c*), was

(*a*) 3 *St. Tr.* 705. (*b*) 1 *W.* & *M.*

(*c*) Sir *Francis Pemberton* was Chief Justice of the court of *C. B.* at the time of Lord *Russel*'s trial at the *Old Bailey* on the 13th of *July* 1683, and was succeeded by Sir *Thomas Jones* in the *September* following. A memorandum in p. 10. (of the second series of paging) of the Great Quo Warranto case against the city of *London*, says that when the demurrer was joined, viz. *Mich.* term, 34 *Car.* 2. (A. D 1682,) Mr. Serj. *Pemberton* was Chief Justice of the *K. B.*: but before *Hilary* term, that it came to be argued, he was removed and made Chief Justice of the *C. B.*, and Sir *Edmund Saunders* was made Chief Justice of the *K. B.* And it appears from p. 119 (the last series of paging) of the same book, that judgment was given in *Trinity* term 35 *Car.* 2., and that Lord C. J. *Saunders* died either the day on which judgment was given, or the next day.

Amongst the rolls in the Crown-office of *K. B.* I found writs tested *Edmd. Saunders* in *Hilary* term 34 & 35 *Car.* 2. Amongst others there is one so tested on 29th *January* 34 *Car.* 2., and another on 12th *Feb.* 35 *Car.* 2, the commencement of the reign being on the 30th of *January*. The writs continue tested by *Saunders* into *Trinity* term, 35 *Car.* 2; one so tested was of the 8th of *June*, 35 *Car.* 2. But on the 27th of *June*, 35 *Car.* 2. they are tested *Thomas Jones*, who was then the senior puisne judge of the court, in whose name writs are tested on the vacancy of the chief justiceship. From the number of writs tested on the 27th of *June*, it seems as

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was probably an honeſt man. Nor can I find fault with his direction in matters of law upon that trial. *The Attorney-General* having alſo deſcribed Lord C. J. *Pemberton*, with reference to his examination before the houſe of commons, as one of the boldeſt judges who ever ſpoke; his Lordſhip obſerved, that Lord C. J. *Holt* was a ſtill bolder judge; for when he was ſummoned before a committee of the Houſe of Lords appointed to hear and report his reaſons to the houſe for his judgment in the *Banbury* caſe (*a*), he ſaid, that if the record were removed before the Peers by error, ſo that it came judicially before them, he would give his reaſons very willingly; but he would not be queſtioned for the reaſons of his judgment in that manner. This happened within a few years after the proceeding againſt Lord C. J. *Pemberton*, which no doubt Lord *Holt* had then in his contemplation. *The Attorney-General* then obſerved, with reference to the *Banbury* caſe, that the ground on which the judgment by the Houſe of Lords againſt the claim of peerage (which judgment was replied by the then Attorney-General to the plea of peerage and miſnomer pleaded to the indictment

(*a*) 1 *Ld. Raym.* 18.

as if it was the laſt day of *Trinity* term in that year. The firſt writ I found upon the roll teſted *George Jefferyes* as C. J. was of the date of the 23d *October* (1) 35 *Car.* 2.; the next is of the 3d of *November*: though *Rapin*, 2 vol. 733. ſays that Sir *Geo. Jefferies* was appointed C. J. of *K. B.* in *December* 1683.

The Chronica Judicialia ſtates that Sir *Francis Pemberton* was appointed Chief Juſtice of the *C. B.* on the 22d of *January* 1682; which, as the civil year then began in *March*, anſwers to the day before *Hilary* term, 34 & 35 *Car.* 2.; and in *Trinity* term following, *i. e. Tr.* 35 *Car.* 2., which was juſt before the trial of Lord *Ruſſel*, it appears by the book of fines in *C. B.*, that Sir *Francis Pemberton*, as Chief Juſtice, took acknowledgments of fines in that term The Chronica Judicialia mentions the appointment of Sir *Thomas Jones* as Lord Chief Juſtice of that court on the 29th of *September* 1683.

(1) This was before the laſt contraction of *Mich.* term by ſt. 24 *G.* 2. *c.* 48.

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for murder in that case,) was held not to conclude the question, was because the proper course had not been pursued to bring the question of peerage in judgment before the Lords; and therefore it was coram non judice; for the resolutions of the Lords in that case were taken upon a petition from the defendant to the House itself to be tried by his peers; whereas the proper course for the trial of the right to a peerage is by petition from the claimant to the King; who thereupon, if he have any doubt upon the matter, refers it to the Lords to examine into it, and make their report of it to him; and upon their report the King determines it. This statement was assented to by Lord *Ellenborough* C. J., who observed, that the record was set out in *Tremaine* (a), and the point very fully and clearly stated in *Skinner* (b); and added, that though the Lords appeared to have had full jurisdiction upon the question, whether or not they would grant a certiorari for removing the record; yet, (without meaning to commit himself upon the question,) perhaps it might be considered that they had outstepped the bounds of their province in adjudicating upon the petitioner's right to the peerage, without a direct reference to them from the crown upon the subject.]

The Atttorney-General, in continuation, referred to a subsequent part of Lord C. J. *Pemberton*'s defence before the House of Commons. "In this case, if Mr. *Topham* "comes and pleads this by way of bar, no Court will "deny but it is a good justification: he has answered "to the thing, and justified what he has done: your "authority will be allowed: but the question is, whe-

(a) *Trem.* 11.

(b) *Skin.* 517. 522, 5.; and vide 8 *St. Tr.* 49., which contains the account of the whole proceedings, including those in the House of Lords.

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" ther this ſhall ſtop the Court that they ſhall not exa-" mine it; for any man living may plead ſuch a plea. " Now the putting him to plead this by way of bar is " only to ſee whether what he hath pleaded is true. " As to all other caſes, when you allow that where they " do any thing in proſecution of an act of parliament, " they ſhall give it in evidence under the general iſſue; " this is by way of bar, and you do in no way ouſt the " court of its juriſdiction." Being called upon again at a ſubſequent time to ſtate further reaſons for his judgment, he gave his opinion more at large; in the courſe of which he ſays then; " I did conſider with my-" ſelf that if this plea ſhould be over-ruled, the defend-" ant was at no prejudice; for the ſame matter might " be pleaded by way of bar; and it would have been " admitted a good bar, if true; and he could have no " manner of prejudice, that I know of, by pleading as " the Court directs. We did not queſtion the legality " of your orders, nor the power of them; but the great " buſineſs was, whether he had purſued this order of the " Houſe of Commons; and that was the thing properly " examinable." Again, he ſays, " No man would have " ſaid that the Houſe ſhould not have made ſuch an " order; or that he ſhould not have executed it in the " way you intended it." So that the juriſdiction of the Houſe to commit in that caſe was completely recognized by Lord C. J. *Pemberton*. Sir *Thomas Jones* ſays, " I " think Mr. *Topham* was adviſed and told, that he ought " to plead this matter in bar; wherein there would be " full conſideration and perfect regard given to the " commands and authority of this Houſe, and all ima-" ginable reverence. If he had but produced a copy at " moſt of your journal, that had been ſufficient; and

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" no judge would have been so silly, or imprudent at " least, to have said that had not been a good and sufficient authority. But Mr. *Topham* thinks it not fit at " all to answer in this plea to the taking the 30*l.*; to " which, if it were extortion upon the subject, I am " sure that whosoever has a care of the rights of the " subject, as you have, would not have suffered the " subject to have gone without remedy and satisfaction."

[Lord *Ellenborough* C. J. Lord C. J. *Pemberton* had no occasion to make any excuse for his conduct; the plea was bad in the whole of it. Part of the cause of action alleged in the declaration was for detaining the plaintiff till he had paid a sum of money for his deliverance: the defendant pleaded the warrant of the Speaker to the serjeant at arms, to bring the plaintiff to the bar of the house, but said nothing about detaining him till the payment of the money. It had a double vice: it was bad in that respect, and also as being pleaded both as a plea in bar and in abatement to the jurisdiction: there could not be a more clearly defective plea; and the Court could not have decided otherwise than they did, unless they had been grossly ignorant or inattentive to their duty. But the judges were at the same time perfectly agreed upon that which is the question here, viz. *the right of the house to commit for contempt.*]

The Attorney-General—Then there is the opinion of those two learned judges, that this would be a good justification, if pleaded in bar. The next material authority is *The King* v. *Murray* (*a*), in 1751, where upon a habeas corpus issued, it was returned, " that the prisoner was, by an order of the House of Commons, " committed to Newgate *for a high contempt* of that " House:" and it was moved to bail him upon the habeas *Murray's case.*

(*a*) 1 *Wils.* 299.

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corpus act, (3 *Car.* 2. *c.* 2.) which it was said was of higher authority than an order of the House of Commons. *Wright* J. says; "It appears, upon the return of this "habeas corpus, that Mr. *Murray* is committed to "Newgate by the House of Commons "for a high and "dangerous contempt of the privileges of that house:" "and it is now insisted upon at the bar, that this is "a bailable case within the meaning of the habeas "corpus act. To this I answer, that it has been de-"termined by all the judges to the contrary; that it "could never be the intent of that statute to give a "judge at his chambers, or this Court, power to judge "of the privileges of the House of Commons. The "House of Commons is undoubtedly a high court; and "it is agreed on all hands, that they have power to "judge of their own privileges: *it need not appear to us* "*what the contempt was, for if it did appear, we could* "*not judge thereof.* Lord *Shaftesbury* was committed for "a contempt of the House; and being brought here by "a habeas corpus, the Court remanded him. And no "case has been cited where ever this Court interposed. "The House of Commons is superior to this Court in "this particular," &c. *Dennison* J. says, "In this case "we granted the habeas corpus, not knowing what the "commitment was for: but now it appears to be for a "contempt of the privileges of the House of Commons. "What these privileges (of either house) are, we do "not know; nor need they tell us what the contempt "was; because we cannot judge of it: for I must call "this Court inferior to the House of Commons, with re-"spect to judging of their privileges and contempts "against them," &c. Then Mr. Justice *Foster*, who will not be suspected of truckling to the authority of the

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House, or of deserting the rights of the subject, for the purpose of recommending himself to persons in power, says; "The law of parliament is part of the law of the "land; and there would be an end of all law if the "House of Commons could not commit for a contempt. "All courts of record, even the lowest, may commit "for a contempt. And Lord *Holt*, though he differed "with the other judges, yet agreed that the House "might commit for a contempt in the face of the House." [Lord *Ellenborough* C. J. There Mr. Justice *Foster* states Lord *Holt's* opinion much more narrowly than it is laid down in the report of Lord *Raymond*. He did not confine it to contempts in the face of the House. And Lord *Holt* is the stronger witness in favour of their general power to commit for breach of privilege, because he was arguing against the power exercised by the House on that occasion. He there says; "He made no question of the "power of the House of Commons to commit: they "might commit any man for offering any affront to a "member, or for a breach of privilege: nay, they might "commit for a crime, because they might impeach." He must be understood, however, with some limitation, when speaking of their power to commit for a crime, because they may impeach: it must be understood of a commitment for the purpose of impeachment.]

The case of *The King* v. *Crosby* (*a*), which follows next, was as much litigated as any case ever was. No attempt was left untried in order to beat down the authority of the House of Commons in that commitment; but no court (*b*), or judge (*d*) in either of the courts, *Crosby's case.*

(*a*) 3 *Wils.* 188. 2 *Blac. Rep.* 754. 11 *St. St Tr.* 335.

(*b*) The application to the Court of Exchequer was made by Mr. Alderman *Oliver*, who stood in the same situation, 2 *Blac. Rep.* 758.

(*c*) An application was made to Ld. *Mansfield* C. J. of *B. R.* in the vacation.

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was to be found, who expressed the slightest shadow of doubt upon the legality of the commitment; and no attempt was made to carry the case further. If it had entered into the mind of any man to conceive that the party, though not entitled to his discharge under a habeas corpus, might still have brought his action against the officer who arrested or the gaoler who detained him, there can be no doubt but that experiment also would have been made. Upon that occasion the same doctrine was laid down by the Court of Common Pleas, as had been before maintained by Mr. Justice *John Powell*, in the case of *The Queen* v. *Paty* (*c*). Speaking of that case, Lord C. J. *De Grey* says, "In the case of the *Aylesbury* "men, the counsel admitted, Lord C. J. *Holt* owned, "and the House of Lords acknowledged, that the House "of Commons had power to commit for contempt and "breach of privilege. Indeed, it seems they must have "power to commit for any crime, because they have "power to impeach for any crime. When the House of "Commons adjudge any thing to be a contempt or a "breach of privilege, their adjudication is a conviction, "and their commitment in consequence is in execution; "and no Court can discharge or bail a person that is "in execution by the judgment of another Court. The "House of Commons, therefore, having authority to "commit, and that commitment being in execution, the "question is, what can this Court do. It can do no-"thing when a person is in execution by the judgment "of a court having a competent jurisdiction; in such "case this court is not a court of appeal." After much more to the same purpose, Lord C. J. *De Grey* proceeds; "There is a great difference between matters

(*a*) 3 *Wils.* 199.

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"of privilege coming incidentally before the Court, and "being the point itself before the Court: in the first "case the Court will take notice of them, because it is "necessary in order to prevent a failure of justice. As in "Lord *Banbury*' case, where the Court of K. B. deter- "mined against the determination of the House of Lords: "but in that case they considered the legality and va- "lidity of the letters patent, without regarding the other "right of a seat in the House of Lords, with which the "Court did not concern themselves." [Lord *Ellenborough* C. J. In that respect Lord C. J. *De Grey* was incorrect: that is not a true statement of the decision in that case. The Court of K. B. held, amongst other things, that the Lords had no authority, upon a mere petition for a certiorari, to make a binding decision upon a right of peerage (*a*).] Lord C. J. *De Grey* afterwards adds, that that case differs much from those which the Court would determine, "because it does not come incidentally before "us, but is brought before us directly, and is the whole "point in question; and to determine it, we must su- "persede the judgment and determination of the House "of Commons, and a commitment in execution of that "judgment." He then proceeds to answer the argument that had been raised, of the possible abuse of such a power by the House of Commons; which he shews would hold also against every other jurisdiction: and concludes with referring to the decisions in the cases of Lord *Shaftesbury* and Mr. *Murray*; in the latter of which he says, that "all the judges agreed that he must be re- "manded, because he was committed by a Court having "competent jurisdiction. Courts of justice have no

(*a*) Vide the 4th reason in *Rex et Regina* v. *Knoilys*, *Salk*. 511. "Here "was no judgment: a Court can give no judgment in a thing not depend- "ing, or that does not come in a judicial way before that Court," &c.

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"cognizance of the acts of the houses of parliament, "because they belong ad aliud examen." All the Court agreed that the Lord Mayor should be remanded. A habeas corpus was also moved for by Alderman *Oliver* (a), in the court of Exchequer, and the Barons were unanimously of opinion with the Court of Common Pleas. No writ of habeas corpus was sued out returnable in this court. But it was still open to them to have brought actions of trespass, if so advised; for the order of remand upon the several writs of habeas corpus could not have been pleaded in bar to such actions; and the not bringing any actions shews the opinions of those who advised the parties, that no such actions could have been maintained; for if the judges had so thought, they would have delivered the parties out of custody instead of remanding them to imprisonment. It is sufficient to advert to *The King* v. *Flower* (b), not as containing any new doctrine, but merely as being the more recent case, and because it was brought before this Court; and for the purpose of observing, that no action of trespass was brought against the officers who had the custody of that person.

Flower's case.

The sum of the several authorities applied to this case.

Here, then, is a concurrent stream of authorities, including all the text writers of the law and of the history of the times, and all the adjudged cases, all concurring in support of the right of the House of Commons to commit for contempts in breach of their privileges, and that they are the judges of what those privileges are, and whether those who are accused before them have been guilty of a breach of them; and that when they have decided that a party has committed a breach of privilege, and have directed that he should be imprisoned for such breach, and have ordered their officer to issue warrants for his apprehension and detention, which warrants have

(a) 2 *Blac. Rep.* 758. (b) 8 *Term Rep.* 314.

been

been executed; their judgment is final, and cannot be queſtioned in any other court whatever. That is the preſent caſe. The Houſe of Commons have determined that Sir *F. Burdett* has been guilty of a contempt and a breach of their privileges; they have for that contempt adjudged him to impriſonment in the Tower; they have in execution of that judgment ordered their officer, the Speaker, to iſſue his warrant for the purpoſe of executing that judgment; the Speaker has iſſued his warrant in obedience to their order; the officer to whom it was directed has executed it; and for that cauſe the preſent action of treſpaſs is brought againſt the officer of the Houſe. The cauſe, then, has been directly decided by the Houſe of Commons, inaſmuch as this authority aſcends in a direct and unbroken line from the act complained of to the power which directed it: the complaint is of the arreſt and impriſonment; thoſe acts were done in the execution of the warrant; the warrant was iſſued by the Speaker of the Houſe of Commons; the Speaker was ordered to iſſue it by the Houſe of Commons; and the Houſe, having juriſdiction over their own privileges, and over thoſe who break them, had previouſly reſolved that Sir *F. Burdett* had been guilty of a breach of the privileges of the Houſe, had ſentenced him to impriſonment, and directed this warrant to iſſue in execution of that judgment.

As to critical objections to the warrant.

With reſpect to the critical objections taken to the form of the reſolutions of the Houſe, and of the warrant referring to them; it is not neceſſary to trouble the Court. The Houſe of Commons is not bound by nor tied down to technical forms: it is enough that the Court ſee in ſubſtance what the plain meaning of the reſolution is, of which there can be no doubt. There appears to have been a groſs libel upon the Houſe of Commons publiſhed in a periodical paper; which libel is admitted

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by Sir *F. Burdett* to have been printed by his authority; and the House upon that resolved that he was guilty of a breach of their privileges; and the Speaker, in obedience to their order, issued his warrant, under which the plaintiff was arrested and committed to the Tower.

As to the breaking of the house, to execute the warrant.

There remains only the question upon the breaking of the house; the outer door being shut. It was stated, that this not being a proceeding at the suit of the crown, the defendant cannot justify the breaking open of the plaintiff's house, although he was within at the time, and had had due notice of the cause of the officer's coming, and had refused, upon request, to admit the officer for the purpose of executing the warrant. And it is said, that there is no case in which the officers of justice are authorized to break open the outer door, except where the King is a party. But that is not a correct statement of the law. The King being a party is only put by way of illustration: the question is whether the process be issued at the instance of a private person, in assertion of a private right, or at the instance of a public authority in the assertion of a public right, where the public weal is interested in the execution of it. The distinction is between public and private rights, and public and private wrongs. Where an individual right only is concerned, the law, weighing the inconvenience of delay on the one side, and the consequence, on the other side, of protecting a man within his own house against a forcible entry, and of preserving the public peace, has judged upon the whole that it is better that he to whom money is due should be put off for a time from enforcing payment of it, or in ascertaining any other private right, than that the public peace should be endangered by entering violently into a man's house in which he is residing. But where the process to be executed is matter of general concern,

concern, in which the public at large have an intereſt; there the public intereſt is to be preferred to the privilege of the individual in the ſecurity of his houſe. That ſuch is the principle of the caſes will appear upon examination of them. One of the caſes referred to was from the year-book, 13 *Edw.* 4. fo. 9.: look then at the reaſoning of that caſe. *Brian* ſays, it was held that for felony, or ſuſpicion of felony, a man may break the houſe to take felons: the reaſon aſſigned for which is becauſe it is for the common weal to take them: that is, in other words, becauſe the public have an intereſt in it. And alſo, *Choke* ſays, that the King having an intereſt in it, the writ is with a non omittas propter aliquam libertatem, &c.; ſo that the liberty of his houſe ſhall not avail him: but otherwiſe it is for debt or treſpaſs, where neither the ſheriff nor any other can break the houſe to take him; *for this is only the particular intereſt of the party.* So that the reaſon aſſigned, and the diſtinction taken is that where the intereſt of the public is concerned, there the door may be broken to make the arreſt; but where the intereſt of the private individual only is concerned, it cannot be broken. The ſame doctrine is laid down in *Maleverer* v. *Spinke* (a), where, after putting ſeveral caſes in which a man may juſtify the commiſſion of a treſpaſs, *where it ſounds for the public good*, the Court ſay; "So alſo is it if the ſheriff purſue a felon "to a houſe, and, in order to take him, break open the "doors of the houſe; that is juſtifiable, *becauſe it is for* "*the public good* that ſuch felons ſhould be taken. But it is "otherwiſe in particular caſes; as if the ſheriff break open "the houſe to arreſt one within the houſe, by virtue of "a capias in debt or treſpaſs, he ſhall be puniſhed; for "this was a particular caſe, and is not for the public

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13 *Ed.* 4. *fo.* 9.

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(a) *Dy.* 35 *a.*

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"good." So far is this principle carried, that even for a debt of the King the outer door may be broken; because the public are interested in the collection of the King's revenue; and that which is due to him, or withheld from him, though but for a time, is a wrong to the public, inasmuch as it is withdrawing from him the means of public supply for the support and protection of the state. Mr. Justice *Foster* (*a*) expresses himself to the same effect, when, treating of the subject of homicide, he confines the privilege of not having the doors of a mansion house forced to arrests upon process in *civil* suits: but the principles of political justice, he says, that is, the justice due to the community, ne maleficia remaneant impunita, all conspire to supersede every pretence of private inconvenience. This is the doctrine which is to be collected from all the cases; looking beyond the mere words used for illustration. *Semaine*'s case (*b*), however, is cited as an authority against the right to break the outer door, except where the King is party to the suit. But no such doctrine is there laid down; though it is said that the privilege of the House does not hold against the King's officer where he is a party: and that rests upon the earlier authorities, to which, therefore, recourse must be had in order to see the foundation of the doctrine. The same case is also reported in *Cro. Eliz.* 908. by the name of *Seaman* v. *Gresham*: and there it appears that the Court were at first divided; but at the conclusion there is this note: "Afterwards in *Michaelmas* term, 2 *Jac.* this cause was argued again; "and *Williams* agreed with the opinion of *Yelverton* and "*Fenner* in omnibus; and that the sheriff might not break "any man's house to take execution, unless in the Queen's "case, *or for a contempt*, &c." This is a decisive autho-

Semaine's case.

(*a*) *Fost. Cr. L.* 320, 1. (*b*) 5 *Rep.* 91. *b.* 92.

rity,

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Briggs' case.

tity, and is explanatory of every thing that has been said. One other authority may be added to these, which is *Briggs's* case (*a*), thus shortly reported by Lord *Rolle*: "In Mr. *Briggs*'s case upon an attachment against him, *Coke* said, that an attachment is a non omittas in itself, and for this the sheriff may break the party's house to take him; for the writ is for his person." It has been suggested that this may have been the case of an attachment for a breach of the peace, upon articles of the peace exhibited against the party: but the Attorney-General said he had caused inquiry to be made into the progress of it, and the office to be searched for what had preceded the attachment in that cause; and it appeared that the attachment issued, not upon articles of the peace, but *for a contempt*; (though it does not appear what the contempt was;) which coincides with what is stated in *Croke*'s report of *Semaine*'s case. Lord *Rolle*'s report of *Briggs*' case states what passed in *Hilary* term 13 *Jac.* 1.; and by a rule of Court made in the *Michaelmas* term preceding, it appears that this was an attachment for a contempt; for the rule directs, that unless the sheriff of *Shropshire* returns the attachment of contempt against *Richard Briggs*, he shall be amerced 100*l.*; and in the *Hilary* term, to which the report refers, the Court made another rule, that unless the sheriff returned the attachment of contempt against *Briggs*, he should be amerced 10*l.* (*b*)

(*a*) *Roll. Rep.* 336.

(*b*) The rules referred to by the Attorney-General run thus: "*Saturday* next after the morrow of *All-Souls*, 13 *Jac.* 1. *Salop*, Ss. Unless the sheriff shall return the writ of our lord the king of *attachment of contempt* against *Richard Briggs* on *Monday* next after the morrow of *All-Souls*, let him be amerced at 100*l.*"

"*Thursday* next after the octave of *St. Hilary* 13 *Jac.* 1. *Salop*, Ss. Unless the sheriff of the said county shall return his writ of *attachment of contempt* against *Briggs* on *Monday* next after fifteen days of *St. Hilary*, let him be amerced 10*l.*"

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This is an express authority in point that, upon an attachment for contempt, the sheriff may break open the door of the house, if necessary, to execute the process.

The public interested in the dignity of the House of Commons, and in its summary power of protecting itself from insult.

The public are mainly concerned in supporting that process which is issued for the public good; and this Court will not so degrade and vilify the House of Commons as to say that that which is a contempt of their privileges is not to be visited in the same way as contempts against the ordinary courts of justice. The public are as deeply interested in vindicating the privileges of the House of Commons from contempts committed against them as against any court whatever. In cases of contempt, more than in most others, the permitting any resistance to process would, in such a crowded metropolis as this, daily add thousands to those who were disposed to resist, and would be subversive of the obvious policy of the law.

Conclusion.

Having then shewn that the right of the House so to deal with the offence and the offender is indisputable; and that their judgment upon the matter cannot be questioned by this Court; and that if it could be questioned, it would be found legal in all its parts; and that the manner in which the process has been issued is strictly legal; nothing more remains to be answered.

Reply.

Holroyd, in reply, said that, though the bearing of much of his former argument upon the present case had been questioned; yet he trusted that he had established several very important points. It is important to have established, first, the authority of the cases before cited, asserting and recognizing the jurisdiction of this

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Court to take cognizance of the privileges of parliament, and to decide upon them when any question concerning them arises incidentally before it, which is necessary for the case in judgment. And it was the more necessary to do this, on account of the dicta thrown out upon the habeas corpus cases by different judges, that they could not take cognizance of those privileges. Secondly, that the House of Commons cannot, by their single resolution, without the rest of the parliament, either make or declare the law: that they cannot of themselves make a privilege; for that would in effect be making a law: and that this has been declared both by the Courts of law and by the conduct of the Parliament itself; because in several of the cases the Commons had claimed privileges, which were questioned in the Courts of law, and disallowed by the Parliament. Thirdly, that the cases upon the habeas corpus, supposing them well founded to the extent they have gone, have been materially distinguished from the present case, by shewing that the question of privilege came in those instances before the Court directly, and not incidentally, as here. The Courts in those cases treat it as a matter of no consequence what the return was, so that it shewed a commitment by either House of Parliament for a contempt; because whatever the particular contempt was stated to be, they say they could not take cognizance of it. In Lord *Shaftesbury*'s case (a), Sir *Thomas Jones* J. says, that "such a return made by "an ordinary court would have been ill and uncertain; "but the case is different when it comes from the High "Court." There the commitment was by the House of Lords for a contempt. And he proceeds to distinguish that from "the cases where the Courts of *Westminster*

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Ld. Shaftesbury's case.

(a) 1 *Mod.* 157.

"have

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"have taken cognizance of privilege; for in thofe it was "only an incident to a cafe before them, which was of "their cognizance; but the direct point of the matter "now is the judgment of the Lords." In that cafe he proceeds to confider that the Court had no jurifdiction to annul the act of the Lords. In like manner as in the cafe of a commitment for a contempt by this Court, the Court of Common Pleas could not difcharge the party, becaufe they have no direct authority or jurifdiction, either by writ of error or otherwife, over any thing done by this Court. And this would hold, whether the warrant of commitment was legal or not. In the fame cafe *Wilde* J. faid; "The return, no doubt, is illegal, but the queftion "is upon a point of jurifdiction, whether it can be exa-"mined here." And *Rainsford* C. J. faid: "This "Court hath no jurifdiction of the caufe, and therefore "the form of the return is not confiderable." If one Court took upon itfelf to difcharge a prifoner committed by another Court of co-ordinate or fuperior authority for a contempt, whatever the particular contempt was ftated to be, or whether it was ftated particularly at all, provided it was ftated generally to be for a contempt, it would neceffarily lead to a conflict of jurifdiction between the two courts: but no fuch conflict arifes in the cafe of an action brought by the party grieved againft the officer who arrefts or imprifons, in order to try the legality of fuch commitment, and to recover damages if it were illegal. The cafes upon the habeas corpus at common law are only to be fupported upon this diftinction, in oppofition to the former cafes cited, fhewing that Courts of law have cognizance of the privileges of Parliament, and of the legality of acts done

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by either House of Parliament, when questioned incidentally in actions before them. [*Bayley* J. You have not answered the question, whether an action could lie in the Court of Common Pleas against an officer of this Court executing its warrant of commitment for a contempt, to question the legality of such a commitment: and I may also ask, whether an action would lie against the judges, or either of them, who signed the warrant?] Certainly no action would lie against judges: they are accountable in another way: no common proceedings in the ordinary way can go against them. But with submission to the Court, if they issued a warrant of commitment in a matter of which they had no jurisdiction at all, and which appeared so upon the face of the warrant; though the Court of Common Pleas, having no dominion over the acts of this Court, could not discharge the party upon habeas corpus; yet an action would lie there against the officer who arrested or imprisoned the party upon such warrant: for whenever an act is done which is illegal to the damage of another, an action lies; and whatever was the decision of the Common Pleas upon that action, it might be rectified, if it were wrong, by writ of error to this Court, and from thence to the House of Lords: so that no mischief could be done, either by letting the party go unrecompensed, if he were wronged; or by invading the jurisdiction of this Court, if it appeared that their officer was properly warranted. [Lord *Ellenborough* C. J. Is there any case in which, when the discharge of a person committed for contempt has been refused on habeas corpus, that any Court has held out, by way of consolation to him, that, though they could not discharge him for fear of breeding a conflict between different jurisdictions, yet that he had an-

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other remedy by an action for damages?] The want of any such intimation, or of any instance of such action brought, though it may furnish an argument against the right of action, will not conclude the question: for if it can be shewn to be contrary to the general principles of the law and constitution, that the subject should be wrongfully arrested or imprisoned in any case, without a remedy by action, the Court will still hold that such an action is maintainable. The very case of Lord *Shaftesbury* illustrates the value of the distinction; for the Lords themselves in 1680 (*a*), four years after their commitment, resolved, that all the proceedings against him were contrary to law, and should not be drawn into precedent. [Lord *Ellenborough* C. J. That was a declaration, that their own proceedings in committing him were contrary to law; which would be an authority to themselves: but their resolution could not be admitted as any authority, if it extended to the proceedings in the Courts of law. Suppose yesterday there had been a vote of the House of Commons, determining, that the proceeding under this warrant was illegal; could we, sitting here in judgment upon a demurrer, consider what had so taken place upon that subject? It might put an end to the consequences of that commitment so far as depended upon the House itself; but how could it affect the law of the question in discussion before us?] The right of action, notwithstanding a refusal to discharge the party committed on habeas corpus, is more strongly evinced in the result of Sir *Thomas Darnel*'s case (*b*), which was a commitment by the privy council, and by the special command of his

Sir T. Darnel's case.

(*a*) *Lords' Journals*, vol 13. p. 623. See also the resolutions of the Lords against the proceedings of the Commons in the *Aylesbury* case.
(*b*) 7 *St. Tr.* 113—137.

Majesty: the Court, upon application, refused to discharge him from that commitment; considering themselves concluded by the warrant from examining into the legality of the cause: but that case inducedt he Petition of Right, in which it was declared that such a warrant was illegal, in not stating the cause of commitment. Yet there had been a multitude of precedents prior to that time, in which the judges considered that they had no authority to discharge the party, though the cause of commitment was not stated. [*Bayley* J. asked, whether any actions had been brought upon those commitments, which were five in number; and was answered, that none such appeared. Lord *Ellenborough* C. J. observed, that the commitments there professed to have been made by the special command of the King.] The defendants were imprisoned for refusing to lend money to the King on commissions for loans: five brought writs of habeas corpus cum causâ: the Warden of the Fleet returned a warrant to him, signed by two of the privy council, requiring him *to continue* Darnel in his custody, and to let the Warden know that "he was and "is committed by the special command of his Majesty," &c.; which return was objected to, because the warrant did not specify the cause of commitment. The Court determined that the warrant was good, on the ground that they had no jurisdiction over commitments by the King, or the Lords of the Council. And several cases were stated from *Moore*, 139. in the time of *Elizabeth*, to shew, that they can only be delivered by the power that committed them; this Court not having a direct authority over the acts of the King in Council. And then they cite the resolution of all the judges of *England* in *Anderson*'s time, that a person so committed cannot

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cannot be delivered by a habeas corpus out of this Court; for the Court knows not the caufe of the commitment. If then an action would not lie againft the perfons iffuing or executing the procefs, the confequence would be this; that, though the law declares that the King's prerogative is limited, and that thofe who do an illegal act, or execute for him any thing beyond his prerogative, are punifhable for fo doing; the party fo unjuftly and illegally reftrained of his liberty would be without means of liberation for the future or remedy for the paft; and there would be an unlimited power in the King and Privy Council, who would thus be enabled to make law in the particular inftance. Whereas no mifchief could arife in fuffering an action to be brought; becaufe if the party under fuch a warrant had been wrongfully imprifoned; this Court, having cognizance of wrongful imprifonment, the caufe of imprifonment alleged would only incidentally come in judgment before them; and this Court would not in that cafe affert any fuperiority over the Privy Council, whofe acts they were thus neceffarily obliged to review; and the ultimate adjudication of the queftion would go to the King in Parliament by writ of error from this Court. [Lord *Ellenborough* C. J. Was the commitment in Sir *T. Darnel's* cafe confidered as a commitment by the Privy Council, or by the King?] It was confidered as a commitment by the Privy Council; but in the difcuffion, the Court ftate that they have no jurifdiction over commitments by the King or by the Privy Council. [Lord *Ellenborough* C. J. To be fure it could not be contended that the King himfelf could execute fuch powers: they muft be executed by him through the medium of others, who are anfwerable if they be not legal; otherwife, all conftitutional checks would be deftroyed.]

ſtroyed.] They ſometimes uſed to be ſtated as commitments by the Council, and ſometimes by the King himſelf, per Regem in Concilio; ſo that ſuch commitments might be conſidered as the acts of ſuch of the Council as concurred in them. But even conſidered as ſuch, the acts of the Council in that caſe would not be controlable by law, if no action lay where they committed a perſon when they had no juriſdiction to do ſo: although the Courts of law might have no juriſdiction to diſcharge the party out of cuſtody from their commitments. Whatever body has the power of committing perſons at its pleaſure, as for a contempt, the right and lawful exerciſe of which power can neither be queſtioned directly upon a habeas corpus, nor incidentally in an action at law for the falſe impriſonment; that body, whether it be the King's council, or either Houſe of Parliament, has in effect an unlimited power, and is enabled to make law in the particular inſtance. In all governments there muſt indeed be an unlimited power ſomewhere; but the great value of our conſtitution is that it is compoſed of mutual checks, and that no one branch of it alone can make law in any caſe.

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Diſtinction as to acts done by members of parliament in or out of the Houſe.

It may be admitted, that no action will lie againſt any member of parliament for what he does or ſays, as ſuch, *in* parliament: nor will any action lie upon a mere reſolution of the Houſe of Commons, whether it be lawful or not lawful. [*Bayley* J. What is Mr. *Abbot* but a member?] He is not queſtioned for what he did as a member *in* parliament; but for what he afterwards did *out* of parliament. [*Bayley* J. The warrant is iſſued by the authority of the houſe of commons, and as their act; but they order the Speaker, as their principal member, to ſign it. Lord *Ellenborough* C. J. You muſt make them all treſpaſſers, or none. If the one who ſigns the warrant be

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liable, all who commanded the act to be done must be equally liable. Those who are directly instrumental in doing the illegal act out of parliament may be trespassers, although the House itself would not be answerable for framing the resolution, however illegal, within their own doors. Suppose a case, however improbable, to happen, that the House were to direct the Speaker to issue his warrant to put a man to death: none of those who formed the resolution in parliament would be responsible; but for the execution of such an order, for the act done out of parliament, the person who issued the warrant, and those who executed it, would be responsible for murder. [Lord *Ellenborough* C. J. The question in all cases would be, whether the House of Commons were a Court of competent jurisdiction for the purpose of issuing a warrant to do the act. You are putting an extravagant case. It is not pretended that the exercise of a general criminal jurisdiction is any part of their privileges. When that case occurs, which it never will, the question would be whether they had general jurisdiction to issue such an order; and no doubt the Courts of justice would do their duty.]

The right of the Court to look at the cause of commitment stated in the warrant.

It is not necessary in this part of the argument to dispute whether they have a right to commit in some particular cases; but only for the right of this Court in all cases to look at the warrant and the resolution, and to see whether or not the House has kept itself within its jurisdiction: and it has only jurisdiction to commit for breaches of its privilege. Without saying at present whether a libel can in any case be a breach of privilege; at least it ought to have been averred in the plea, that the plaintiff had been guilty of a breach of privilege; and likewise it should have been shewn what the libel was which they make a breach of privilege. [Lord *Ellenborough* C. J. They

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They have come to a resolution, which is a judgment in this case; and are we to open the matter of that judgment, and say whether they came properly to that conclusion? We must look at the conclusion, and say whether that bears out the act of their officer. *Bayley* J. If we can unravel their conclusion, the County Court can do it also; for the plaintiff might have brought his action in the County Court as well as in this Court; omitting the vi et armis, and laying his damages under 40 shillings; and then the County Court would have had to decide on the fact, whether there had been a breach of privilege; whether the defendant were guilty.] The plaint would be removeable into the superior court. He then recapitulated his objections to the plea in bar, that it does not state that there was any libel on the House of Commons, or what the libel was, nor that that libel was a breach of the privileges of the House. But whether it was so or not, that the warrant in this case was not sufficient. Notwithstanding any authority of the House to the Speaker to issue a warrant to commit the plaintiff, the Speaker is answerable if he do not issue a sufficient warrant for that purpose. If that which is stated in the warrant to be a breach of privilege be clearly not so by law, the Court is bound to decide against it according to law; and in the case of a warrant which is to take away from a man his liberty, nothing is to be inferred but what the words of themselves fairly and strictly import. It cannot be a breach of the privileges of the House to print a libel, without shewing at least that it was published; and no publication is stated: and this is an objection appearing on the warrant itself. The distinction between the question of privilege not being examinable by the Courts of law when arising *directly* upon motion to

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difcharge the party committed when brought before the Court by habeas corpus, and being examinable when arifing *incidentally* before the fame Court upon an action brought for the imprifonment, runs through and reconciles all the cafes. Unlefs the action were maintainable in that cafe, the party wronged by an illegal imprifonment would be without remedy, contrary to every legal and conftitutional principle; but no mifchief can arife by leaving that remedy open; becaufe there will be no conflict of jurifdiction, and the judgment of this Court is examinable in the Court of Parliament itfelf, by which any error in judgment may be corrected. With refpect to the breaking the outer door, Lord *Coke*'s authority in *Semaine*'s cafe is exprefs, that the outer door of every man's houfe is privileged from being broken, except only where the King is party: and Lord *Coke* fo underftands the cafe in the Year-book 13 *Ed.* 4. fo. 9. to which he refers. And if the exception had alfo been extended to the cafe of contempts, as ftated in the report of *Semayne*'s cafe in *Cro. Eliz.*, it is very extraordinary that fo material a point fhould have efcaped the obfervation of fuch a man as Lord *Coke*; and not lefs extraordinary that in the multitude of cafes of contempt which muft have occurred from that time to the prefent, no other than the fingle precedent of *Briggs*' cafe fhould be found in fupport of it; the circumftances of which it muft be difficult at this day to afcertain, the cafe being fo fhortly and barely noticed in the report; and the leading cafe in the Year-book only mentioning the breaking of doors in cafes of felony or fufpicion of felony. [Lord *Ellenborough* C. J. The law is indeed fo laid down in that cafe; but it is an extra-judicial opinion; the point in judgment being, whether an act avoiding all the corporations and licences

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of *Henry* the 6th ſhould be taken notice of as a public act, or ought to have been pleaded as a private act. There is no judicial determination of the point in queſtion: therefore you do not lay the foundation for your doctrine ſo ſolidly as was to be expected. There is an earlier caſe in the 18 *Edward* 2. (*a*) which goes further, and which ſeems to import that upon all proceſs in execution the outer door may be broken; but it is clear from other authorities that in civil proceſs at the ſuit of any individual the outer door cannot be broken. That was expreſsly decided in *Cook's* caſe (*b*), where the very point came in judgment, whether the killing the officer in attempting to break the door to execute civil proceſs againſt the party was murder or manſlaughter; and it was held to be only manſlaughter.]

Holroyd then expreſſed his anxious deſire that the Court, if they had any doubt upon the queſtion, would require another argument, on account of the great importance of the caſe, and of the topics which it embraced.

Judgment.

Lord ELLENBOROUGH C. J. It does not appear to me with reſpect to the only points which are before us in judgment in this caſe, that any further argument is neceſſary: the caſe has been already argued very fully and with great ability, and I do not think that further light can be thrown upon the ſubject by another argument. If the Court had any doubt upon the caſe they would certainly take further time for the conſideration of it; but it will be recollected that it has been depending for

(*a*) Vide *Fitz. Abr. Execution, pl.* 152. (miſprinted 252.), corrected in *Bro. Execution, pl.* 100. from 18 *Ed.* 4. 4. *pl.* 19.; and ſee alſo the report of the caſe of *Semayne* v. *Greſham*, in *Yelv.* 28.

(*b*) *Cro. Car.* 537.

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ſome time before us; and having been diſcuſſed at great extent, and the authorities diligently canvaſſed in the courſe of the laſt term, it has naturally led the judges to look with attention into the authorities then cited, and to take a full conſideration of the record before us; and upon the moſt mature conſideration of that record, and of the law connected with the ſubject matter, I own I have not a particle of doubt as to the judgment which it behoves the Court to pronounce upon this occaſion.

This is an action of treſpaſs commenced by Sir *Francis Burdett*, complaining of the defendant for breaking and entering his houſe, the outer door of it being ſhut, and doing this with force and a ſtrong hand, aſſiſted by ſoldiers, and taking him out of his houſe, putting him into a coach, and carrying him through the public ſtreets under a military guard to the Tower of *London*, and there delivering him into the cuſtody of the lieutenant of the Tower, and confining him in ſuch cuſtody. There are other counts in the declaration for ſimilar treſpaſſes againſt the plaintiff's perſon, unaccompanied by the circumſtances of the breaking and entering the houſe, the outer door being ſhut: and there are alſo counts for falſe impriſonment generally, and for a common aſſault. The defendant, the Speaker of the Houſe of Commons, juſtifies the ſeveral treſpaſſes complained of; ſtating that at the time of committing theſe ſuppoſed treſpaſſes a parliament was holden and ſitting at *Weſtminſter*; that the defendant was a member, and alſo Speaker of the Commons Houſe of Parliament, and that the plaintiff was alſo a member of that houſe. It then ſtates a reſolution of the Houſe prior to the ſuppoſed treſpaſſes, that a letter ſigned "*Francis Burdett*," and a further part of a paper entitled "Argument," accompanying the ſame,

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and inferted in *Cobbett's Weekly Regifter*, was "a libellous and fcandalous paper, reflecting on the juft rights and privileges of that Houfe:" and alfo "that Sir *Francis Burdett*, Bart., who had admitted that letter and argument to have been printed by his authority, had been thereby guilty of a breach of the privileges of that Houfe: and that it was thereupon then and there ordered that Sir *Francis Burdett* fhould be for his faid offence committed to the Tower of *London*, and that the Speaker fhould iffue his warrant accordingly." It then ftates the iffuing of fuch warrant to the Serjeant at Arms, reciting the refolutions and order of the Houfe, which I have already ftated, and commanding him or his deputy to take into his cuftody the body of Sir *Francis Burdett*, and then forthwith to deliver him into the cuftody of the lieutenant of the Tower. And then it ftates the delivery of the Speaker's warrant to the Serjeant at Arms. It further proceeds to ftate another warrant iffued by the Speaker to the lieutenant of the Tower, reciting the fame refolution and order of the Houfe of Commons before-mentioned; and ftates the delivery of this laft-mentioned warrant to the lieutenant of the Tower. That, by virtue of the firft-mentioned warrant, the Serjeant at Arms, in order to take the body of Sir *Francis* and deliver him to the lieutenant of the Tower, went to the meffuage of Sir *Francis*; and becaufe the outer door was fhut and faftened, fo that the Serjeant at Arms could not thereby enter the meffuage, he, the Serjeant at Arms, then and there in a loud and audible voice gave notice to Sir *Francis*, who was then in his meffuage, of the purpofe for which he came, that is, to arreft him by virtue of the warrant. That the Serjeant at Arms required the outer door to be opened, that he might be admitted into the houfe to execute the

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warrant; and becaufe the outer door was not opened, but kept faft againft him, and he was refufed admittance, he with the aid of foldiers and armed men broke open the window and thereby entered into the Houfe for the execution of the warrant, and made the arreft of the plaintiff; and, in obedience to the warrant, compelled him to go out of his meffuage into the ftreet, and from thence into a coach, and fo conveyed him to the Tower, and delivered him into the cuftody of the lieutenant of the Tower.

This is the juftification pleaded on the part of the Speaker; to which juftification there is a demurrer: and the only points which are immediately prefented by the record for our decifion are, firft, Whether the Houfe of Commons has any authority by law to commit in cafes of contempt as for a breach of privilege? Secondly, Whether, fuppofing the Houfe to have fuch an authority in general, that authority has been well executed by the warrant in queftion; that is, whether the warrant ftated in the plea of the defendant difclofes a fufficient ground of commitment in this inftance? And thirdly, Whether the means which have been ufed for the execution of the Speaker's warrant are in law juftifiable? The fubject, as it feems to me, cannot properly be branched out and divided into more points. In argument it has indeed been dilated to a much wider extent here, and has been confidered in much greater latitude as a queftion of controverfy elfewhere, than is at all neceffary for the decifion of thefe which are the only points with which we have judicially any concern upon the prefent occafion. The citations made upon the firft argument from the judgment of Sir *Orlando Bridgeman* rather tend to illuftrate the character of that moft eminent judge, by exhibiting the

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profundity of his learning, and the extent of his induſtry, than to throw any material light upon the preſent queſtion. A very moderate portion of the learning there diſplayed by him is at all applicable to the preſent caſe. The main point decided, and properly decided, in that caſe was, that the privilege of Parliament, which exempted members from arreſt, did not wholly ſuſpend the right of ſuit againſt them during the entire continuance of the Parliament, at leaſt ſo as to prevent the ſuing them by original. So a great part of the learning exhibited upon *Thorpe's* caſe there cited, though properly adverted to as the caſe itſelf was, bears very little on the queſtion immediately before us. That caſe, which is to be found in the *Rolls of Parliament*, 31 *H.* 6. No. 26, 27, 28. decides that a ſuit commenced againſt a member might proceed to any extent in the time of the vacation of parliament, though not in parliament time, as it is called. *Thorpe's* caſe appears to be the earlieſt applicable to parliamentary privilege; for the two other caſes of an earlier date mentioned by Lord *Coke* in his *4th Inſtitute* (24), that of *John de Thoreſby*, 10 *Ed.* 3. and of *Bogo de Clare*, 18 *Ed.* 1., are ſhewn by Sir *Orlando Bridgeman* in his Judgment, in *Benyon* v. *Evelyn*, to have no proper reference to the privileges of the members of the Houſe of Commons: and indeed, according to this caſe of *Thorpe*, as ſuppoſed by Lord *Coke*, it appears that the exemption from arreſt was not claimed or conſidered as the peculiar privilege of a member of the one or of the other Houſe of Parliament, properly as ſuch; but as the privilege of a member of the High Court of Parliament *generally*: and the reaſon of ſuch privilege, as given by the judges, is one which applies equally to the members of both Houſes, viz. " that they may have their freedom and liberty

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freely to intende upon the Parliament." Other cases have been cited, in which the right of the subject to sue upon matters of parliamentary cognizance has been in part recognized by the Courts. The first-mentioned of these cases however, that of *Thorpe*, respects merely the privileges of individual members, and the means of their individual protection, not the vindictive privileges of the House for offences done generally against the body of the House, in breach of the rights and privileges of the whole House collectively considered. The other cases next mentioned, of *Bogo de Clare*, and *John de Thoresby*, do not apply to this question; which is, what acts the House of Commons may justifiably do; not where, or how, such acts shall be alone brought into question.

As to the first point which arises in this case; has the House of Commons a right to commit for breach of privilege? It has been argued, that they are prohibited from imprisoning persons by the statute of Magna Charta, and the 28 *Ed.* 3. *c* 3.: but the provision in Magna Charta directed against acts of unauthorized force, "that no man shall be imprisoned but by the *lawful* judgment of his peers, or *by the law of the land*;" and that of the stat. 28 *Ed.* 3. "that no man shall be put out of land or tenement, *nor taken or imprisoned*, nor disinherited, nor put to death, without being brought in to answer *by due process of the law*;" are satisfied as far as they relate to this subject, if the *lex et consuetudo parliamenti* be, as Lord *Coke* and all the writers on the law have held that it is, part of *the law of the land* in its large and extended sense. At what time the two Houses of Parliament, as at present constituted and distinguished, that is, as Lords and Commons, first ceased to sit together, as originally they did, and began to have a separate existence, is a matter more of antiquarian curiosity than of legal importance. The

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ſeparation of the two Houſes ſeems to have taken place as early as the 49 *H.* 3. about the time of the battle of *Eveſham*; for I think it is at that period that the firſt return of "knights, citizens, and burgeſſes" is to be found; and that ſeparation was probably effected and previouſly ſanctioned by a formal act for that purpoſe by the King and Parliament as originally conſtituted. At any rate the very firſt ſubſequent act of the parliament, acting in the two Houſes conjointly with the King, operated as a formal recognition of an antecedently authorized ſeparation of parliament into the two Houſes in which they then and have ſince ſat. The privileges which have been ſince enjoyed, and the functions which have been ſince uniformly exerciſed, by each branch of the legiſlature, with the knowlege and acquieſcence of the other Houſe and of the King, muſt be preſumed to be the privileges and functions which then, that is, at the very period of their original ſeparation, were ſtatutably aſſigned to each. The privileges which belong to them ſeem at all times to have been, and neceſſarily muſt be, inherent in them, independent of any precedent: it was neceſſary that they ſhould have the moſt complete perſonal ſecurity, to enable them freely to meet for the purpoſe of diſcharging their important functions, and alſo that they ſhould have the right of *ſelf-protection*: I do not mean merely againſt acts of individual wrong; for poor and impotent indeed would be the privileges of Parliament, if they could not alſo protect themſelves againſt injuries and affronts offered to the aggregate body, which might prevent or impede the full and effectual exerciſe of their parliamentary functions. This is an eſſential right neceſſarily inherent in the ſupreme legiſlature of the kingdom, and of courſe as neceſſarily inherent in the parlia-

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parliament assembled in two Houses as in one. The right of self-protection implies, as a consequence, a right to use the necessary means for rendering such self-protection effectual. Independently, therefore, of any precedents or recognized practice on the subject, such a body must à priori be armed with a competent authority to enforce the free and independent exercise of its own proper functions, whatever those functions might be. On this ground it has been, I believe, very generally admitted in argument, that the House of Commons must be and is authorized to remove any immediate obstructions to the due course of its own proceedings. But this mere power of removing actual impediments to its proceedings would not be sufficient for the purposes of its full and efficient protection: it must also have the power of protecting itself from insult and indignity wherever offered, by punishing those who offer it. Can the High Court of Parliament, or either of the two Houses of which it consists, be deemed not to possess intrinsically that authority of punishing summarily for contempts, which is acknowleged to belong, and is daily exercised as belonging, to every superior court of law, of less dignity undoubtedly than itself? And is not the degradation and disparagement of the two Houses of parliament in the estimation of the public, by contemptuous libels, as much an impediment to their efficient acting with regard to the public, as the actual obstruction of an individual member by bodily force, in his endeavour to resort to the place where parliament is holden? And would it consist with the dignity of such bodies, or what is more, with the immediate and effectual exercise of their important functions, that they should wait the comparatively tardy result of a prosecution in the ordinary course of law, for

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the vindication of their privileges from wrong and insult? The necessity of the case would, therefore, upon principles of natural reason, seem to require that such bodies, constituted for such purposes, and exercising such functions as they do, should possess the powers which the history of the earliest times shews that they have in fact possessed and used. It is therefore idle to contend, as some have done, that, as the House of Commons is a body which has began to exist separately and substantively since the time of legal memory, that is, since the return of *Richard* the First from the *Holy Land*; and that, as they cannot on that account claim by prescription or immemorial custom any power of commitment, and that no act of parliament since that time has expresly given it to them; therefore, that it cannot legally belong to them. I am glad that nothing of that kind has been advanced in argument upon this occasion; but it is impossible not to have heard of its having been urged elsewhere and on other occasions. And perhaps more weight has been given to the argument than seems to belong to it, from the pains that Sir *Robert Atkyns* (in his treatise in the form of an argument upon the information against *William Williams* Esq.) has taken to answer it. For he seems to suppose it necessary, "to support the power and privilege of the House of Commons, as being an essential part of the parliament, to make it out against these innovators, (as he calls them,) that the House of Commons has ever been a part of the parliament, and that it was so long before the 49 *H.* 3.;" which, as already mentioned, is the date of the first writ of summons for knights, citizens, and burgesses, now extant: admitting, "that, where the beginning of a thing is known, there can be nothing belonging to it *by prescription*." But *Selden*, I observe,

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obferve, (*Priv. of Parl.* 713.) acknowleges that there had been a great change in the conftitution of the parliament, but fuppofes it to have happened long before the 49 *H.* 3. namely, in the time of that king's father, King *John;* (ftill placing it however within time of legal memory;) and he fuppofes that it was *done by a law,* though the *law be loft;* as *many Rolls of Parliament were wherein thofe laws were entered.* But fuppofing the feparate exiftence of the Houfe of Commons to have began only in the 49 *Hen.* 3., or at fome other period within the time of legal memory; the anfwer to the objection is that fome ftatute or act of fupreme national authority, whatever it was, by which the Houfe then began to exift and act, and has fince acted, feparately, as a diftinct branch of the legiflature from the Lords, and conjointly with the Lords and the King, as a parliament, invefted them, as fuch Houfe, with the antecedent effential privileges which belonged to the aggregate body of parliament, at leaft to the extent in which they have been ever fince enjoyed by that Houfe, and of which the fubfequent enjoyment is evidence: and it would only vary the form of prefcribing, if any prefcription were in fuch cafe neceffary, to fuch an one as the following; namely, that from time whereof the memory of man is not to the contrary until the 49 *H.* 3. all the members of parliament, by their then name of Proceres Nobiles et Magnates, and fince the 49 *H.* 3. by their feveral names of Lords fpiritual and temporal, and of Knights, Citizens, and Burgeffes in parliament affembled, have had and ufed, and now and ftill of right ought to have and ufe fuch and fuch privileges. So that if the *Parliament itfelf,* in any *anterior form* of its exiftence, be of prefcriptive antiquity, about which no reafonable doubt can be entertained, the fame privileges which were

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in fuch anterior form then enjoyed by it may ftill (if neceffary fo to confider it) be even technically prefcribed for by Parliament in the very form into which it has fince refolved itfelf and now fubfifts: unlefs, indeed, it can be contended with effect, that the legiflature itfelf is incompetent to vary the precife form in which, in time beyond memory, it appears to have exifted and acted; a point which, I prefume, few perfons will be hardy enough to contend for. There is no pretence, therefore, for treating the privileges of the Houfe of Commons, as fome perfons have treated them, as things of a novel origin and conftitution, beginning within time of legal memory, and ftanding upon no authority of prefcription or ftatute.

Thefe privileges appear to have been claimed, exercifed, and recognized in numerous precedents almoft as early as we can diftinctly trace the Houfe acting in its feparate parliamentary capacity. Without referring more at large to *Thorpe's* cafe, the perfonal privileges of Parliament are ftated in it in thefe terms: "If any perfon that is a member of this High Court of Parliament be arrefted in fuch cafe as be not for treafon or felony, or furety of the peace, or for a condemnation had before the parliament, it is ufed that all fuch perfons fhall be releafed of fuch arrefts, and make an attorney, fo that they may have their freedom and liberty freely to intende upon the Parliament." I am aware that this authority in terms relates only to privileges of perfonal freedom from arreft, and not to the vindictive privilege of committing for *contempts againft the whole Houfe*. But on this latter point, not to incumber the cafe unneceffarily with a vaft variety and quantity of matter, I would refer only generally to the cafe of *Ferrers*, (very fully reported in *Crompton's*

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Crompton's Jurisdiction of Courts;) *Trewinnard's* case, in *Dy.* 59.; *William Thranwis'* case in 1529, who was committed to the custody of the Serjeant at Arms for a contempt in words against the dignity of the House; *John Wentworth's* case, of the same kind, in 1575, in *D'Ewes' Journal*, 244.; and the case of *Hall*, a member of the House of Commons, in 1580, which is also in *D'Ewes' Journal*, from page 291 to 298. (*a*), and which is the first instance of a libel punished by the House. In that case *Arthur Hall* was punished for a libel on the dignity on the House, by being committed and expelled: and he was also *fined*; in respect to which latter species of punishment, that of fining, the House exercised in that instance a power which they have not since been in the *habit* of exercising: but certainly that precedent, as far as it goes to the expulsion and imprisonment of a member, is fully sustained by more modern usage. He was committed for six months, and to be further imprisoned till a revocation and retraction under his hand of the slander contained in his book. That perhaps might be considered as an excess of jurisdiction; as contrary to the general principles of *English* law: for the Courts of law cannot commit a person TILL he retracts or makes personal submission for his offence: but as far as the mere infliction of imprisonment goes, it shews at least that the House were in the habit of committing for contempts. And the sort of libel for which he was punished, as it appeared in *D'Ewes' Journal*, was not a libel upon individual members, but upon the whole parliament.

Without resting any longer, however, upon these precedents, I come with more satisfaction to an autho-

(*a*) And in 4 *Inst.* 23.

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rity which cannot be gainsayed or questioned; to the legislative recognition of a power in either House of Parliament to punish by imprisonment; for that I think is virtually to be understood from the stat. 1 *Jac.* 1. *c.* 13. But before I observe upon that statute, I will shortly advert to a prior act of the 4th *H.* 8. made in the case of a Mr. *Strode*, who was imprisoned for something he had done in parliament; and by which it was enacted, that "all suits, accusements, condemnations, executions, fines, amerciaments, punishments, corrections, grants, charges, or impositions put or had, or hereafter to be put or had unto or upon the said *R. Strode*, and to every other person or persons afore specified in that parliament, *or that of any parliament that shall be*, for any bill, speaking, reasoning, or declaring of any matter concerning the parliament to be commenced and treated, should be utterly void and of none effect." I own I agree with the cogent reasons given by Sir *Robert Atkyns*, (p. 56. (*a*) that this is to be considered as a general act, notwithstanding the opinion given to the contrary in the case of Mr. *Holles* (*b*), 3 *Char.* 1. This act, however, only relates to the personal immunity and protection of the members themselves, for acts done in Parliament or concerning the same. Then comes the stat. 1 *Jac.* 1. *c.* 13. which, after reciting, that "heretofore doubt had been made if any "person, being arrested in execution, and by *privilege of* "*either of the Houses of Parliament set at liberty*, whether "the party at whose suit such execution was pursued, "be for ever after barred and disabled to sue forth a new "writ of execution in that case:" (which shews very clearly, that Parliament had been in the habit of setting

(*a*) See also 4 *Inst.* 9. to the same effect. (*b*) 7 *St. Tr.* 249.

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aside or superseding such executions;) for avoiding all further doubt and trouble which in like cases may hereafter ensue; *enacts*, "that the party at whose suit such "writ of execution was pursued, his executors, &c. *after such* time *as the privilege* of *that session of parliament*, "in which such privilege shall be so granted, *shall cease*, "may sue forth and execute a *new* writ or writs of execution," &c. Is not this an ample recognition of the prior exercise of an authority by the Houses of Parliament to liberate persons entitled to privilege, who were in execution: this statute enacting, however, at the same time, that it should not be an answer to the further charging him in execution by his creditor, that he had once been taken in execution. The statute then provides, "that from thenceforth no sheriff, bailiff, or other "officer, from whose arrest or custody any such *person* "so arrested in execution *shall be delivered by any such* "*privilege*, shall be charged or chargeable with or by "any action whatsoever, for delivering out of execution "any such *privileged person so as is aforesaid by such privi-* "*lege of Parliament set at liberty*; any law, custom, or "privilege heretofore to the contrary notwithstanding." And then follows this proviso, which is very material to the present purpose: "Provided always, that this act, "or any thing therein contained, shall not extend to the "*diminishing* of any *punishment* to be hereafter *by censure* "*in parliament inflicted* upon any person which shall "hereafter make or procure to be made any such arrest "as aforesaid." Now by *inflicting censure*, the power of doing which was thus saved to the Houses of Parliament, as they had before been accustomed to exercise it, must be meant, not a mere crimination or reproof in *words only*, but the substantial *infliction* of positive *punishment* by

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parliament upon the offender. This aƈt, indeed, applies in terms only to the particular caſe of arreſts; but no one can reaſon ſo weakly as to ſuppoſe, or argue ſo narrowly as to ſay, that the power of the Houſes of Parliament to inflict puniſhment exiſted and had been exerciſed only in that particular caſe. I have mentioned this inſtance, not from the neceſſity of the thing in ſo plain a caſe, but becauſe it has been thrown out very confidently, that the privilege of the Houſe of Commons ſtood upon no parliamentary recognition or authority whatſoever: here, however, is a direct parliamentary recognition of their right to inflict puniſhment by cenſure in parliament in the one caſe that is ſpecifically mentioned, and it virtually ratifies what had been antecedently done by the Houſe in the way of puniſhment, of which the uſual mode appears to have been by impriſonment.

Having ſtated thus much of the earlier precedents and authorities in reſpect to the Parliament itſelf, and their own practice of committing for contempts, I come now to a period nearer to our own times, and more within our own immediate contemplation and view, where the materials for our judgment are more abundant, and the sources from which they are drawn are in ſome reſpects more ſatisfactory. If any perſon more than another could be ſuppoſed to doubt the power of the Houſe of Commons to commit for contempt; if any perſon who ever ſat in this place was, more than any other, jealous of every ſuppoſed encroachment upon the rights of the people, either on the part of the Crown, or of either Houſe of Parliament, or leſs favourable in general to claims of parliamentary privilege, it was my Lord *Holt*. There is no perſon at all converſant with the diſputes that have taken place in the courts of law on this ſubject, who is not

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acquainted with the particulars of the case of *Ashby* v. *White*; and how he stood singly and manfully in an opinion, which was at last confirmed by the House of Lords, in maintaining the right of the subject to maintain an action in that case. The legality, however, of a power in the House of Commons to commit for breach of privilege, generally, is so far from being questioned by Lord *Holt* in *The Queen* v. *Paty* (a), the case in which the bailing of the *Aylesbury* men, committed by the House of Commons for bringing actions against the constables of *Aylesbury* for refusing their votes at an election for members of parliament, was agitated, that he expressly recognizes their power in the passage which has been referred to by the Attorney-General. His words are these: he said, "he made no *question of the power of* "*the House of Commons to commit: they might commit any* "*man for offering an affront to a member*;" (which must be understood of an affront to a member as such;) "nay, (he said) they might commit for a crime, because "they might impeach." This, I presume, must be intended of a commitment for a crime in order to an impeachment: otherwise, he would admit them to have a general criminal jurisdiction, which certainly he could not mean to attribute to them. It is impossible for any thing to be more full, explicit, and unqualified, than this language of Lord *Holt*, in which he recognizes a power of commitment in the House of Commons for a breach of the privileges of their House: and what is said of the House of Commons may be understood as said also of the House of Lords; for they are one and the same in this respect: they are but the grand council of the realm divided into two different parts, each carrying with it

(a) 2 *Ld. Ray.* 1105.

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this effential power and privilege to protect itfelf, which each has exercifed ever fince (and therefore muft be prefumed collectively to have exercifed before) their feparation.

Prior to *Afhby* v. *White*, in point of time, was the Earl of *Shaftefbury*'s cafe (*a*), which was a commitment by the Houfe of Lords "for a high contempt (ftated to have been) committed againft this Houfe." Two of the judges there thought that it was a material ingredient in that cafe, that the feffions during which the commitment was made was then continuing. The Chief Juftice *Rainsford* thought, that the Court of K. B. had no jurifdiction of the caufe; and *Twifden* J., who was abfent, communicated by *Jones* J. his opinion, that Lord *Shaftefbury* fhould be remanded. No diftinction was taken in that cafe between the authority of the Lords and that of the Commons to commit. And notwithftanding the generality of the commitment, which was for a high contempt, without faying when, where, or how committed, it was fuftained by this Court, and Lord *Shaftefbury* was remanded. This cafe has been referred to by judges in later times as an authority upon the point. And in *Alexander Murray*'s cafe (*b*), the commitment, which was by the Houfe of Commons for an offence againft them, was in the fame terms, "for a high contempt of this Houfe." Mr. Juftice *Wright* fays in that cafe, "that it was agreed on all hands that they (the Houfe of Commons) have power to judge of their own privileges. It need not appear to us what the contempt was; for if it did appear, we could not judge thereof." And then he cites Lord *Shaftefbury*'s cafe. Mr. Juftice *Dennifon* fays, "They need not tell us what the con-

(*a*) 1 *Mod* 144. (*b*) 1 *Wilf.* 299.

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tempt was, because we cannot judge of it." Mr. Justice *Foster* says, "The law of Parliament is a part of the "law of the land, and there would be an end of all law, "if the House of Commons could not commit for a "contempt: all courts of record, even the lowest, may "commit for a contempt: and Lord *Holt*, though he "differed with the other judges, yet agreed that the "House might commit for a contempt in the face of "the House." That statement of Mr. Justice *Foster* certainly represents Lord *Holt* as having narrowed his admission far beyond what he appears to have done by Lord *Raymond*'s report. The power of committing for contempts is not there limited by Lord *Holt* to contempts committed *in the face of the House*. I do not know how those words got into *Wilson*'s report; but the report of Lord *Holt*'s own words, as made by Lord *Raymond*, who heard them, is more likely to be correct. Upon this case I would observe, that I agree with *Wright* and *Dennison*, Justices, in thinking, that it *need not appear* what the contempt was; but I am not prepared to say with them, that we could in *no case* judge of it, or that there might not appear such a cause of commitment as, coming collaterally before the Court in the way of a justification pleaded to an action of trespass, the Court might not be obliged to consider and to pronounce to be defective: but it might be a more doubtful question whether, coming directly before us, as on a return to a habeas corpus, we could relieve the subject from the commitment of the House in any case whatever.

The next case which came before the Courts on habeas corpus is, I think, *Brass Crosby*'s, a case very fully considered by a most learned judge, Lord C. J. *De Grey*; and

and which was alſo decided by the opinion of all the judges of the Court of Exchequer, as well as of the Common Pleas; for applications were made to both thoſe Courts to liberate the perſons who had been committed by the Houſe for contempt: but I do not know of any application having been made to this Court on that occaſion. Without going at large into the report, which is unneceſſary after the full comment made at the bar on the language of the judges there ſtated; it is ſufficient to ſay, that Lord C. J. *De Grey* and the other judges were moſt clearly of opinion, that the Houſes of Parliament were inveſted with the power of committing for contempts in breach of their privileges.

It has been ſaid in anſwer to all theſe caſes of refuſal by the Courts to liberate on habeas corpus the parties who had been committed by either Houſe of Parliament for contempt, that the Courts, knowing that the party committed had a remedy by action if he had been illegally committed, would not give him relief in that direct mode, but turned him over to the remedy by action if he were entitled to it, without inquiry whether or not he were entitled to relief in the particular inſtance. Now to what extent it may be warrantable to inquire into the cauſe of commitment, it is not neceſſary to pronounce: the commitment muſt always be by a Court of competent juriſdiction; and the competence of the Houſe of Commons to commit for a contempt and breach of privilege cannot be queſtioned. A competence to commit for all matters and in all caſes has never been aſſerted or pretended to on the part of either Houſe of Parliament: the Houſe of Commons does not pretend to a general criminal juriſdiction. But if the judges before whom thoſe applications were made on writs of habeas corpus

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had felt that the Houses had no pretence of power to commit, or had seen upon the face of the returns that they had exercised it in those cases extravagantly, and beyond all bounds of reason and law, would they not have been wanting in their duty if they had not looked into the causes of commitment stated; and would it have been an excuse for a most imperfect discharge of their important duty upon the writ of habeas corpus to say, that though they remanded the prisoner, he had his remedy by action, if the case were that he ought never to have been committed at all? Is not the value of the intermediate liberty of the subject of such importance, that, where his case falls within the remedy of the writ of habeas corpus, the judges were bound at common law to give the party the benefit of his immediate liberation, rather than to turn him over to a distant remedy by action against a party who may die before he can obtain his judgment; or, if he live, may become insolvent? That would be but a poor and forlorn remedy for the party aggrieved by the loss of his liberty; and it would be the greatest slander upon the administration of the law of *England* to say, that those who were called upon to administer it on those occasions would have so done. Upon this subject I will only say that if a commitment appeared to be for a *contempt* of the House of Commons *generally*, I would neither in the case of that Court, or of any other of the superior Courts, inquire further: but if it did not *profess* to commit *for a contempt*, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or national justice; I say, that

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in the cafe of fuch a commitment, (if it ever fhould occur, but which I cannot poffibly anticipate as ever likely to occur,) we muft look at it and act upon it as juftice may require from whatever Court it may profefs to have proceeded. But is it found in any one inftance, that upon a refufal by the Courts to difcharge the party upon the writ of habeas corpus, in times even of popular inflammation, and where he might have had a chance of getting a large compenfation in damages, if he were proved to have been injured, any fuch action has been afterwards brought? No fuch action has been ever brought, nor is it pretended that in any one of the various cafes, in all of which the judges have refufed to liberate the party committed for contempt, any ulterior remedy by action was ever fuggefted as fit to be reforted to.

Thus the matter ftands upon the authority of precedents in parliament, upon the recognition by ftatute, upon the continued recognition of all the judges, and particularly of Lord *Holt*, who was one of the greateft favourers of the liberties of the people, and as ftrict an advocate for the authority of the common law againft the privileges of parliament as ever exifted. I fhould have thought that this was a quantity of authority enough to have put this queftion to reft, (which alone I am now confidering,) that is, whether the Houfe of Commons has the power of commitment for a contempt of their privileges? What is there againft it? Is it inexpedient that they fhould have fuch a power? And I am now confining myfelf to the limits in which it is exercifed in the cafe before us. I have already faid that a priori, if there were no precedents upon the fubject, no legiflative recognition, no practice or opinions in the Courts of law recognizing fuch an authority, it would

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ſtill be eſſentially neceſſary for the Houſes of Parliament to have it; indeed that they would ſink into utter contempt and ineſſiciency without it. Could it be expected that they ſhould ſtand high in the eſtimation and reverence of the people, if, whenever they were inſulted, they were obliged to wait the comparatively ſlow proceedings of the ordinary courſe of law for their redreſs? That the Speaker with his mace ſhould be under the neceſſity of going before a grand jury to prefer a bill of indictment for the inſult offered to the Houſe? They certainly muſt have the power of ſelf-vindication and ſelf-protection in their own hands: and if there be any authenticity in the recorded precedents of Parliament, any force in the recognition of the Legiſlature, and in the deciſions of the Courts of law, they have ſuch power.

Aſſuming then that the Houſe has the power of commitment, the next point is whether it has been well exerciſed by the warrant in queſtion. The warrant ſtates a reſolution of the Houſe of Commons, that a certain paper (deſcribing it) which the plaintiff, a member of the Houſe, admitted to have been printed by his authority, was a libellous and ſcandalous paper reflecting on the juſt rights and privileges of the Houſe; and that the plaintiff had thereby been guilty of a breach of the privileges of the Houſe. It is ſaid that there ſhould have been an averment in the plea of all the ſeveral matters recited in the warrant as the foundation upon which it iſſued; and that it is not enough to allege an order of the Houſe of Commons aſſuming the facts to be as ſtated in it. But if it be clear, as it is, that this was a matter which the Houſe were competent to decide both as to the fact and the effect of the publication; then by analogy

analogy to the judgment of a Court of law, (and the judgments of either Houfe of Parliament cannot with propriety be put upon a footing lefs authoritative than thofe of the ordinary Courts of law,) the Houfe muft be confidered as having decided both, as far as refpects any queftion thereupon which may arife in other Courts. Again, it is faid, that it is not ftated that the plaintiff *publifhed* the libel; only that it was *printed by his authority*: but to *caufe a libel*, as this is declared to be, to be *printed* by others is a publication, fuppofing a publication to be ftrictly required in fuch a cafe. If the paper had been printed with his own hands, and had gone no further, it might not be a publication; but it being ftated to have been done by his *authority* imports that it was not his own perfonal act, and therefore it muft have been done by *another* under his authority; *who* thereby, by fuch his authority, became privy to the contents of the libel. It is further objected that it may be a libellous and fcandalous paper in other refpects than that which concerns the Houfe of Commons; that it might *reflect* upon *them* in the moft refpectful manner, though it might be libellous and fcandalous towards others. But are we to deprive words of their obvious and popular fignification in order to arrive at this conclufion? When it is faid in ordinary language, that a perfon has publifhed a *libellous and fcandalous* paper *reflecting* upon a body of perfons, the word *reflecting*, coupled with the context, muft be underftood to mean *injurioufly* and *contumelioufly reflecting*, reflecting in a defamatory manner: it is ftating the paper to be libellous and fcandalous, infomuch as it fo reflects upon that body. The order might perhaps have been couched in more precife language; and if drawn by perfons in the habit of fettling convictions and commitments,

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it might have been done in what, with reference to such a subject, might be called a more workmanlike manner; but it is sufficiently plain and intelligible as it stands for all ordinary purposes. The conclusion of the order, that the plaintiff should be committed to the Tower for his said offence, and that the Speaker should issue his warrant accordingly, is the formal award of the execution of that power of imprisonment, which, upon grounds of law and precedent, already appears to belong to the House in cases of this sort. Indeed no stress has been laid in argument upon any supposed defect in the warrant in this particular.

Supposing then a power of commitment for breach of privilege to exist in the House, and that the warrant itself discloses a sufficient ground of commitment, and an order to their officer to execute it, the justification for the persons acting under it is made out, unless any unjustifiable means appear to have been afterwards used to carry the warrant into execution. And that brings me to the last point to be considered, whether the means which appear to have been used on this occasion for the execution of the Speaker's warrant were justifiable? And that depends upon the single question, Whether, after notice given by the Serjeant at Arms of the purpose of his coming to the plaintiff's house, and the nature of the warrant he came to execute, and after a request, made by him, that the outer door might be opened to him, which was not complied with, he was authorized to break into the house for the purpose of arresting the plaintiff, and carrying the warrant into full execution? Nothing is more certain than that in the ordinary cases of the execution of civil process between subject and subject, no person is warranted in breaking open the outer

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door in order to execute ſuch proceſs: the law values the private repoſe and ſecurity of every man in his own houſe, which it conſiders as his caſtle, beyond the civil ſatisfaction of a creditor. But I have already obſerved that the diſtinction taken in argument ſtands upon an extra-judicial opinion in the year-book of the 13 *Ed.* 4. 9. It is there ſtated to have been held, "that for felony, or ſuſpicion of felony, a man may break open the houſe to take the felon; for it is for the commonweal to take them." And likewiſe *Choke* ſaid, "Where the king has an intereſt, that the writ is a non omittas propter aliquam libertatem, &c. So the liberty of the party's houſe ſhall not hold where, &c. but otherwiſe it is *for debt or treſpaſs;* the ſheriff or other cannot break open the houſe to take him; *for this is only the particular intereſt of the party.* And this is cited in *Fitz. Abr. Barre, pl.* 110. Therefore, even in that caſe, the intereſt of the king in the execution of proceſs ſeems only to be put in contra-diſtinction to the intereſt of an individual in proceſs ſued out for his own particular benefit; inaſmuch as the proceſs of the crown reſpects the public juſtice and public intereſt of the realm: but it is not put in contra-diſtinction to proceſs for contempt, in which the public at large have as much intereſt as in other criminal proceſs. It is extremely important, where citations are made from the year-books in the abridgements, to look at the caſes themſelves from which the dicta are imported; for I have often found that a reference to the original caſe gives a very different meaning to the paſſage cited. Here it appears to have been a merely extra-judicial ſubject of diſcuſſion: the queſtion being whether an act of parliament, that all the corporations and licences granted by King *H.* 6. ſhould be void, need be

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ſpecially pleaded, or whether it ſhould be judicially taken notice of as a public act: in conſidering which the paſſage cited occurs as matter of obſervation between the judges. If it reſted upon that alone, I ſhould not have thought it an authority; eſpecially when I find an older caſe in *H.* 18 *Ed.* 2., which is in *Fitz. Execution*, *pl.* 152 (*a*); where it is ſaid, "Note, that the miniſter of the king coming to levy *execution of damages recovered* may break open the houſe faſtened if he cannot have the key: for it is not lawful for any to diſturb the execution of the king's miniſter," &c. It is not however clear that this might not relate to a levy by the king's miniſter, as he is called, for the king's debt, and not to a levy by the king's officer for the debt of an individual ſubject. But in the latter ſenſe the point was certainly ruled otherwiſe, (and according to the dictum in the year-book 13 *Ed.* 4. 9.) in the year-book 18 *Ed.* 4. 4. *pl.* 19. referred to in *Bro. Abr. Execution*, *pl.* 100.; for there all the juſtices agreed that *treſpaſs lay againſt the ſheriff for breaking the houſe to execute a fieri facias*; "for by the fieri facias he may take the goods, but may not break the houſe." (*b*). What is ſaid by the judges in that caſe is confirmed by a ſtill more important authority; a deciſion in a caſe of life and death. This was *Cooke*'s caſe (*c*), who was indicted for murder in voluntarily killing a ſheriff's officer while attempting to break into the houſe for the purpoſe of executing civil proceſs againſt him; and this was held to be manſlaughter, and not murder. Upon the authority therefore of that caſe I ſhould ſay that it ſtands perfectly clear, that an execution at the ſuit of an

(*a*) By miſtake printed 252.

(*b*) See alſo 27. *Aſſize*, 137. *pl.* 35. and 7 *Ed.* 3. 16. *pl.* 19.

(*c*) *Cro. Car.* 557.

an individual cannot be carried into effect by breaking open the outer door: and therefore it remains to be considered whether in this case the house was broken in the execution of process for the particular interest of an individual, or whether it was done for the public weal? That it falls under the latter description cannot, I think, be doubted. And without going into the other books cited by the Attorney-General to shew that the privilege of keeping the outer door shut against process is confined to process in civil suits, it is sufficient to refer to *Semayne's* case as reported in *Cro. Eliz.* 909., where it is said "that afterwards in *Mich.* term, 2 *Jac.* 1., this cause was argued again; and that *Williams* agreed with the opinion of *Yelverton* and *Fenner* in omnibus, and that the sheriff might not break any man's house to take execution, *unless* in the *Queen's* case, *or for a contempt*," &c. We understand by this a contempt of any of his majesty's Courts of justice: but it cannot be contended that the Houses of Legislature are less strongly armed in point of *protection* and remedy against contempts towards them, than the Courts of justice are. There is also *Briggs'* case, cited by the Attorney-General, which came on before Lord C. J. *Coke*, and is to be found in 1 *Roll. Rep.* 336. It appears from the search which has been made in that case, that the sheriff was ruled for not returning an attachment against *Briggs*: and there it was held clearly that on process of contempt the outer door might be broken open. Therefore upon authorities the most unquestionable this point also has been settled, that where an injury to the public has been committed in the shape of an insult to any of the Courts of justice, on which process of contempt is issued, the officer charged with the execution of such process may break open doors if necessary in order to

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execute it. And therefore, upon these authorities, I conceive myself justified in saying, that all the points essential to be maintained in order to sustain the defendant's justification upon this record are made out. First, it is made out that the power of the House of Commons to commit for contempt stands upon the ground of reason and necessity independent of any positive authorities on the subject: but it is also made out by the evidence of usage and practice, by legislative sanction and recognition, and by the judgments of the Courts of law, in a long course of well-established precedents and authorities. 2dly, That the resolution of the House, that the plaintiff had been guilty of a breach of its privileges, and that the order made for his commitment for that offence, were in conformity to their power: that the warrant issued by the Speaker in this case, which warrant in itself embraces the resolution and order of the House, was made in the due execution of their order: and that the mode of executing that warrant in this case, by breaking the house, after due notification and demand of admittance without effect, is justifiable, upon the ground of its being an execution of a process for contempt, to which the personal privilege of the individual in respect to his door must give way for the public good. Under these circumstances, without the least particle of doubt upon my mind, I am clearly of opinion that there must be a judgment for the defendant.

Grose J. The validity of the defendant's pleas in justification has been so fully argued, and the principles and the different authorities upon which we must determine the case, have been so elaborately stated by my lord, that it is unnecessary for me to do more than to say, that I per-

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perfectly agree that the defendant's justification is made out upon all points.

BAYLEY J. (a) I am entirely of the same opinion in this case. My lord has gone so very fully into it, that it would be improper for me to take up more time than by adding a few words. In an early authority upon this subject, in Lord *Coke*, 4 *Inst.* 23. it is expresly laid down, that the House of Commons has not only a legislative character and authority, but is also a Court of judicature, having power of judicature: and there are instances put there, in which the power of committing to prison for contempts has been exercised by the House of Commons, and this too in the case of libel. If then the House be a Court of judicature, it must, as is in a degree admitted by the plaintiff's counsel, have the power of supporting its own dignity as essential to itself; and without the power of commitment for contempts, it could not support its dignity. It is also admitted, that an action would not lie against the members of the House for any thing done as such; and if no such action will lie, I think that makes an end of this question: for it appears to me that the Speaker, in issuing the warrant which he has done by order of the House, did not act in the character of a *subordinate officer*, but in the character of a *member of the House*. When the House make an order that their Speaker shall issue his warrant, they do not direct him to do it as a subordinate minister to them, but only as being the individual member of greatest dignity in the House, by whom, on this and other occasions, the House speaks and acts; and his act in this re-

(a) *Le Blanc* J. was unable to attend from indisposition.

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ſpect is not, I think, the act of an officer, but the act of a member of the Houſe. But if it were the act of an officer of the Houſe, acting under and by virtue of its judgment on the ſubject-matter, I cannot help thinking that, where a Court has competent juriſdiction to decide upon a point, and has decided and given judgment upon it, and they direct their officer to carry that judgment into execution, the officer is protected by that judgment. If the Court have ordered him to do that which was within their juriſdiction to order, he is bound to obey their order. But it is ſaid, that the privilege of parliament is examinable in this court, and that it ought to have been averred, that this party was guilty of the contempt, ſtating it as a traverſable fact, which might be tried again elſewhere againſt thoſe who acted under the authority of the Houſe of Commons. If that were ſo, the fact would be examinable not only in this Court, but in every inferior Court throughout the kingdom, in which an action of treſpaſs could be ſupported. Then, as the courts of juſtice muſt be conſidered as ſtanding in the ſame ſituation, in reſpect to their judgments, as the Houſe of Commons ſtands with reſpect to its own orders, it muſt alſo be contended, that if this Court were to adjudge a party to be guilty of contempt, and were to direct an attachment to iſſue againſt him, and to commit him for that contempt, any other Court, however inferior, might try the ſame queſtion again in an action of treſpaſs; becauſe it would be ſaid to ariſe incidentally, whether or not the party was guilty of that fact of which this Court had adjudged him to be guilty, and whether that fact was a contempt of this Court. I cannot ſee how to ſtop ſhort of going that length, if this action can be ſupported.

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The plaintiff's counsel has cited a number of cafes, which I will not go through, upon the habeas corpus act, which he has endeavoured to diftinguifh from this: thefe are the decifions of judges at diftant periods of time, having full opportunity of re-confidering the queftion; all concurring in acknowledging the power of each Houfe of Parliament to commit for contempt. And though in the cafe of *the Queen* and *Paty* (a), Lord *Holt* differed from the other judges upon the particular queftion which arofe there, yet he agreed on general principles, that the Houfe had power to commit for contempt; but he thought, that in the particular warrant then in queftion the Houfe had ftated that to be a contempt, which he, in his judicial capacity, was bound to fay was no contempt, and therefore that the warrant itfelf fhewed an excefs of their jurifdiction, and was felo de fe. Thefe cafes upon the habeas corpus act were attempted to be diftinguifhed from this, by relying upon expreffions made ufe of by fome of the judges, that although they could not queftion judgments of commitment by the Houfe *directly*, yet that when thofe judgments came *incidentally* before them, they would have full power to examine into them. And then it is affumed that in this particular cafe the queftion arifes *incidentally*. Now, as it appears to me, the very object of this action is to make a *direct* attack upon the judgment of the Houfe of Commons, and to bring that matter, and that matter only, into queftion: and would it not be abfurd to fay that though we cannot difcharge the party committed from his imprifonment, becaufe that would be directly arraigning the judgment of the Houfe, yet that he fhall have an opportunity of recovering by action full fatisfaction for lying in prifon; and that in giving fuch

(a) 2 *Ld. Ray* 1005.

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ſatisfaction the judgment of the Houſe is left where it was. But it ſeems to me that the giving the party full ſatisfaction for his impriſonment is, in legal contemplation, to do away all the puniſhment he has received: and if that be not bringing into queſtion again the judgment of the Houſe, I cannot underſtand how the point can be more directly brought into queſtion. This is what occurs to me to ſay upon this part of the caſe.

As to the warrant, it ſeems to me that it has diſtinctly enough pointed out that which, uſing our common ſenſe upon the ſubject, muſt be underſtood to be a contempt of the Houſe. It ſtates that a certain paper, printed by the authority of the plaintiff, was a libellous and ſcandalous paper, reflecting upon the juſt rights and privileges of the Houſe: and every perſon reading that muſt know that it means libellous and ſcandalous reflections caſt upon the juſt rights and privileges of the Houſe.

Then as to the breaking of the outer door to execute the warrant, I think that whoever reads *Semaine*'s caſe will ſee that Lord *Coke* was making the diſtinction between thoſe caſes in which the king, ſtanding forward as proſecutor on behalf of the ſubject on public grounds, was party, and other caſes in which the ſubjects were parties only in reſpect of their private rights: but he was not meddling with caſes of contempt. Proceſs of contempt, however, has been held in other caſes to warrant the breaking of the outer door for the purpoſe of executing it: it was ſo in *Semaine*'s caſe, and in *Briggs*' caſe; and there is another caſe in *Willes*, 459., in which an attachment for a contempt was treated not as civil, but as criminal proceſs; and therefore it was held that it might be executed on a *Sunday*: and the reaſon aſſigned is, that a contempt of the Court is *a breach of the peace*. Now in every breach of the peace the public are conſidered as intereſted, and the execution

execution of procefs againft the offender is the affertion of a public right: and in all fuch cafes, I apprehend that the officer has a right to break open the outer door, provided there is a requeft of admiffion firft made for the purpofe, and a denial of the parties who are within. Upon thefe grounds I entirely agree with my lord and my brother *Grofe*.

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Judgment for the Defendant.

Sir FRANCIS BURDETT, Bart. *againft* FRANCIS JOHN COLMAN, Efq.

Wednefday, June 19th.

THIS cafe, which was a fequel to the preceding, was tried at the bar of the court on *Wednefday* the 19th of *June* 1811, the Court being then full. The declaration was in trefpafs for an affault and falfe imprifonment of the plaintiff by the defendant, the Serjeant at Arms of the Houfe of Commons, acting in execution of the Speaker's warrant, and the form of the counts was in terms the fame as in the action againft the Speaker, reddendo fingula fingulis. The pleas alfo in this action were like thofe in the former; namely, the general iffue of not guilty, and two fpecial pleas of juftification; the one juftifying the arreft and imprifonment of the plaintiff under the Speaker's warrant, and the breaking of the houfe, the outer door being fhut and fastened

The Serjeant at Arms of the Houfe of Commons, being charged with the execution of the Speaker's warrant for arrefting and conveying to the Tower the plaintiff, a member of the Houfe, for a breach of privilege, is not guilty of any excefs of authority in the execution of fuch warrant, fo as to make him a trefpaffer ab initio, if, upon the refufal of the plaintiff to fubmit to the arreft, and his fhutting his outer door againft the Serjeant, who had demanded admiffion for the purpofe, and declaring that the warrant was illegal, and that he would only fubmit to fuperior force; and a large mob having affembled before the plaintiff's houfe, and in the ftreets adjoining; fo that the Serjeant could not arreft and convey the plaintiff to the Tower, without danger to himfelf and his ordinary affiftants, if at all by the mere aid of the civil power; the Serjeant thereupon call in aid a large military force; and after breaking into the plaintiff's houfe, plant a competent number of the military therein for the purpofe of fecuring a fafe and convenient paffage to conduct the plaintiff out of the houfe into a carriage in waiting, and from thence conduct him with a large military efcort to the Tower: ufing at the fame time every perfonal curtefy to his prifoner confiftent with the due execution of his duty; which however will not admit of delay, (breeding hazard,) in the execution of fuch warrant.

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faſtened againſt the officer, for the purpoſe of executing ſuch warrant, and the execution of it by the aſſiſtance of ſoldiers and armed men; the other ſimilar to it, only omitting to juſtify the breaking of the houſe. The only difference in the juſtifications pleaded by this defendant from thoſe pleaded by the Speaker being, that theſe juſtificatory pleas contained in addition a diſtinct allegation that the defendant, at the time of the ſeveral treſpaſſes complained of, was Serjeant at Arms of the Houſe; and omitted ſo much of the former pleas as related to the other warrant of the Speaker addreſſed to the Lieutenant of the Tower; only alleging (after ſtating the delivery of the plaintiff into the cuſtody of the Lieutenant of the Tower of *London* by the defendant, to be kept and detained in priſon there, in obedience to the reſolutions and order of the Houſe) "as it was lawful for him to do for the cauſe aforeſaid:" and then concluding as in the former pleas pleaded by the Speaker. But in this caſe the plaintiff, inſtead of demurring as in the former action to the juſtificatory pleas, replied ſpecially, as follows, after joining iſſue to the country upon the plea of not guilty.

Replication.

Replication.—And the ſaid Sir *Francis*, as to the plea of the ſaid *Francis John Colman* by him ſecondly above pleaded, as to the ſaid ſeveral treſpaſſes in the introductory part of that plea mentioned and therein attempted to be juſtified, ſaith that he the ſaid Sir *Francis*, by reaſon of any thing by the ſaid *Francis John* in that plea alleged, ought not to be barred from having and maintaining his aforeſaid action thereof againſt him the ſaid *Francis John*, becauſe, proteſting that the ſaid plea is wholly inſufficient in law to bar or preclude the ſaid Sir *Francis* from having and maintaining his aforeſaid action againſt him the ſaid *Francis John*, for replication nevertheleſs in this behalf the ſaid Sir *Francis* ſaith, that the

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That the Serjeant at Arms executed the warrant by breaking the plaintiff's house and arresting him with a large military force, improper, excessive, and unnecessary for the purpose, and in an unreasonable manner, and more violently than was necessary or proper.

said *Francis John*, at the said time when, &c. in the same plea mentioned, at the parish aforesaid, in the county aforesaid, wrongfully and injuriously with force and arms, *and with a large military force of our said Lord the King*, then and there armed with dangerous and offensive weapons, to wit, with muskets, bayonets, swords, &c., the same military force being then and there used by him the said *Francis John* against the said Sir *Francis in and for the execution of the said first-mentioned warrant* in the same plea mentioned, *and with such military force*, so armed and used as aforesaid, *as was improper, excessive, and unnecessary for that purpose;* the same military force being the said soldiers and men armed in the said first count mentioned; *and in an unreasonable manner, and more violently than was necessary or proper in or for the execution of the same warrant*, to the great terror and alarm of the said Sir *Francis*, *broke and entered the said messuage* of the said Sir *Francis*, (*the outer door* of the said messuage then and there *being shut and fastened*,) and broke open the said windows and window-shutters, and through the same broke into and entered the said messuage, and made a great noise and disturbance therein, and made the said assault in the said first count mentioned on the said Sir *Francis*, and laid hands upon him, and forced and compelled him to go from and out of his said messuage into the said public street there, and also forced him to go in the said coach in, through, and along the said streets and highways in the said first count mentioned to the said prison called the Tower of *London*, and there imprisoned the said Sir *Francis* in manner and form as the said Sir *Francis* hath in his said declaration above thereof complained against him the said *Francis John*: and this he the said Sir *Francis* is ready to verify: wherefore since the said *Francis John* hath above in his said second plea

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acknowledged the committing of the trespasses above by the said Francis John in his said second plea attempted to be justified, he the said Sir *Francis* prays judgment and his damages by reason of the committing thereof to be adjudged to him, &c. There was a similar replication to the third plea, omitting the breaking of the house.

Rejoinder, taking issue on the excess.

The defendant rejoined, as to the replication to the second plea, that by reason of any thing therein alleged the said Sir *Francis* ought not to have or maintain his aforesaid action against him as to the several supposed trespasses in the introductory part of that plea mentioned and therein justified, because he says that he the said *Francis John did not commit the said several supposed trespasses, or any of them, with such military force as was improper, excessive, or unnecessary for the execution of the said first-mentioned warrant*, in the same plea mentioned, *nor in an unreasonable manner and more violently than was necessary or proper in or for the execution of the said warrant*, in manner and form as the said Sir *Francis* hath in his said replication above alleged: and of this he the said *Francis John* puts himself upon the country, &c. There was the like rejoinder to the third plea. The plaintiff joined issues on these facts.

Shepherd Serjt. led the cause on the part of the plaintiff, who was assisted also by *Runnington* Serjt., *Holroyd*, *Clifford*, *Courtenay* jun., and *H. Shepherd*. In the course of addressing the jury, Serjt. *Shepherd* (*a*) said, that as to a great part of this cause, the defendant, the Serjeant at Arms of the House of Commons, was to be considered merely as a nominal defendant, being no more than an

(*a*) No other part of the learned Serjeant's address to the jury is introduced than that which involved considerations of law.

instrument

inftrument for executing the Speaker's warrant; the queftion as to the legality of that warrant being in truth in controverfy between the plaintiff and the Houfe of Commons. But an officer might exceed his authority; and however valid the warrant might be in itfelf, he would at all events be anfwerable for any excefs or mifconduct of his own in the execution of it. It was evident however in this cafe that the fame power, which directed the defendant to execute the warrant, upheld him alfo in the mode which he had adopted for that purpofe. He obferved that though the record prefented many queftions for difcuffion and decifion, yet he did not mean to ftate that all thofe queftions, which muft be decided fomewhere, were fit or proper for the confideration and decifion of the jury; for the law of this country, much as it valued, and highly as it ought to value, the province and functions of a jury, had wifely made a diftinction in this refpect; referring mere queftions of law to the decifion of the judges learned in the law; and queftions of mere fact to the determination of the jury: and when queftions of law and fact are fo mixed that they cannot be feparated, the learned judges who prefide at the trials of caufes fo circumftanced ftate their opinions upon the law to the jury who are to decide the facts. That as to thofe queftions of law which had been decided by the judges in the former caufe of *Burdett* againft *Abbot*, he fhould withdraw them from the decifion of the jury, not as having been decided in another caufe, but becaufe he did not confider them as fit fubjects for their decifion. But if any of the fame queftions were to arife in this caufe, which he thought were fit for the decifion of the Court, he fhould, with all reverence to the high authority by whom thofe queftions had been before decided, again bring them into judgment.

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The ſubſtance of the plaintiff's complaint is, that the defendant broke and entered his houſe with a military force, and arreſted and took him as a priſoner to the Tower of *London*. The defendant anſwers that there being a parliament aſſembled, the Houſe of Commons had reſolved that the plaintiff, a member of that Houſe, had been guilty of publiſhing a libel reflecting upon their privileges, and had thereupon ordered him to be committed to the Tower. Now whether the Houſe of Commons have by law the power to come to ſuch a reſolution is a queſtion of law and of law only: the queſtion of fact, which could alone upon that have been introduced to the conſideration of the jury, would have been whether the Houſe had ſo reſolved or not: but as to the queſtion of law, it was not neceſſary then to diſcuſs it, as the jury had no juriſdiction to decide it. The defendant further anſwers, that the Houſe in conſequence of that reſolution, through the medium of their Speaker, iſſued their warrant to the defendant, as Serjeant at Arms, directing him to arreſt the plaintiff and deliver him to the cuſtody of the Lieutenant of the Tower. Whether or not that warrant ſo iſſued was a legal warrant to the defendant to arreſt the plaintiff muſt alſo be a queſtion of law. But how, or in what mode, or with what degree of force the defendant might execute that warrant under the circumſtances involves matter both of law and fact: whether he had a right to break open the houſe, in order to arreſt the plaintiff, is a queſtion of law combined with certain facts. If there were a neceſſity for doing ſo in order to execute the warrant, after admittance demanded and refuſed; the right to do ſo would be a queſtion of law. But it is not open to the plaintiff now to agitate the queſtion whether or not there was ſuch a neceſſity in that reſpect; for the plea ſtates that the defendant did demand admittance

admittance and could not obtain it, and therefore he afterwards broke the window as the moſt convenient way of getting into the houſe for the purpoſe; and that is not put in iſſue: and therefore whether he could break the houſe for the purpoſe ſtated is matter of law. But ſtill the manner and circumſtances with which the Houſe was broken and entrance obtained, that is the doing this with the aſſiſtance of a military force and great numbers of perſons, and the conduct of the officer and his aſſiſtants afterwards in the plaintiff's houſe, involve, together with matter of law, very important matters of fact proper for the conſideration of the jury. The plaintiff complains that it was done with a military force, and with ſuch military force as was improper, exceſſive, and unneceſſary for the purpoſe, and that it was done in an unreaſonable manner, and more violently than was neceſſary or proper for the execution of the warrant. This exceſs is denied on the part of the defendant; and that is the peculiar and important point which the jury have to try.

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Without touching the queſtion whether the Houſe of Commons may make any reſolution they pleaſe as to their privileges, or in what caſes they may commit; it is neceſſary to conſider what was the nature of the proceſs which the Serjeant at Arms was charged to execute, in order to aſcertain what was the proper mode of executing it, and whether the mode purſued by him was proper. This proceſs is difficult to be deſcribed, becauſe the form of it is not to be found in any of the ancient books of the law. In early days when the Houſe of Commons firſt began to vindicate their own privileges, they ſeem hardly to have known by what proceſs it was to be done. At firſt it was ſuppoſed that the production of the mace and a verbal order to the officer who bore it was a ſufficient

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warrant for the purpose (*a*): the Speaker's warrant was then unknown. Neither is any thing more certain to be found in any law book with respect to the office of Serjeant at Arms. The ancient common law officers for executing process, with the duties and powers belonging to them, are spoken of in all our law books and in acts of parliament; but nothing is known of the duties and powers of the Serjeant at Arms, except in the exercise of this authority delegated to him by the House of Commons itself. The Serjeant at Arms is a patent officer appointed by the Crown. One of the officers of that description is assigned by the King to attend the Lord Chancellor, or the Court of Chancery, and he has the execution of at least one species of process of that Court, that is, against a party who does not come in upon a commission of rebellion issued against him. One mode of trying the legal powers of an officer in the execution of process is to see whether his right to call in assistance is recognized by any legal authority. The sheriff, it is well known, has a right, recognized by the common and statute law, to call in aid all who are resident within his county to assist him in the execution of criminal and civil process, upon occasions, against resistance made or threatened. So also constables and other known conservators of the peace at common law may, if resisted, call in the by-standers to their aid; and those to whom notice is given are indictable if they refuse to assist. But no such recognition is to be found in our books of the authority of the Serjeant at Arms to call others in aid of him in execution of the Speaker's warrant. In whose name is he to call for it? Not in the name of the Crown, because he is not charged with the execution of the process of the Crown. The House of

(*a*) This alludes to *Ferrers'* case, vide ante, 40.

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Commons would repudiate the aſſiſtance of the Crown to execute its proceſs. Beſides, the execution of legal proceſs may again be, as in former times it has been, voted a breach of privilege; and the ſheriff and the Serjeant at Arms may call for aſſiſtance againſt each other; and which call is the ſubject to obey? The ſubject might be placed in a predicament liable to be puniſhed either for aiding or for refuſing to aid the Serjeant at Arms. The Houſe might vote it a breach of privilege, as they formerly voted Lord C. J. *Pemberton* and another of the judges guilty of a breach of privilege for giving a legal judgment upon the record, ſuch as every judge muſt have given upon that record; and as the Houſe have done upon other occaſions of legal proceedings had againſt their reſolutions: but it never was heard of that a perſon was liable to be indicted for refuſing to aid the Serjeant at Arms in the execution of proceſs, but only for refuſing to aid the King's civil officer upon aſſiſtance duly demanded and withheld. In the year 1697 Mr. *Duncomb*, a member of the Houſe of Commons (*a*), was accuſed in the Houſe of having attempted to forge certain indorſements upon Exchequer-bills; on which the Houſe expelled and committed him, and alſo paſſed a bill of pains and penalties againſt him. But when the bill was ſent to the Lords' Houſe, they threw it out; thereby acquitting the perſon accuſed of the charge; and ordered him to be releaſed from cuſtody, and ſent their own officer to releaſe him: on which the Commons ordered their Serjeant at Arms to take him again. Suppoſe theſe officers, thus acting under counter orders, had met at the door of the priſon, and each had called on a by-ſtander for aid in the execution of his proceſs; if the ſubject were bound to act in aid of either of the conflicting authorities, he muſt

(*a*) *Com. Journ.* vol. 12. 63.

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fall a victim whatever part he took. He might then fairly ſay with the dying *Mercutio* who fell a victim to the feud between the houſes of *Montague* and *Capulet*, " a plague o' both your houſes." But ſuppoſing there might exiſt occaſions where the Serjeant at Arms may lawfully call in aid the civil power to overcome reſiſtance to the execution of the Speaker's warrant; and ſuppoſing that " all mayors, bailiffs, ſheriffs, under-ſheriffs, conſtables, and headboroughs, who are particularly enumerated in the warrant, were bound, on being required to aſſiſt him in the execution of it; (which, whether they are ſo bound or not, it is not neceſſary now to determine:) ſtill the plaintiff would have a right to complain, as he now does, that the Serjeant at Arms did not call to his aſſiſtance thoſe known officers of the law, but came with a large military force to make the arreſt, and with that force broke and entered the plaintiff's houſe, planted ſoldiers in it with military array, and with military parade conducted him from his houſe in *Piccadilly*, through the public ſtreets, like a priſoner in a ſtate of warfare as a foreign enemy, to the Tower. Without meaning to ſay that there might not be caſes where the civil power would be warranted in calling in the aſſiſtance of the military, if an abſolute neceſſity exiſted for it, in order to ſupport the legitimate arm of the law againſt force; yet in every free ſtate and in the mind of every free man there is and ever will be a great jealouſy of military interference in the civil adminiſtration. Men embodied as ſoldiers have duties caſt upon them very different from thoſe by which they are governed as civil citizens; they are bound to a ſtricter ſpecies of obedience to their officers than ordinary: when called into ſervice, they cannot diſcriminate upon their own judgment on the different degrees of neceſſity, but are bound to yield a prompt obedience to their officers. It is a ſpecies of force therefore which is

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aliene to the regular enforcement of the laws, which all men are bound to ſupport upon their individual judgment when properly called upon; and reſort to ſuch extraordinary force can only be juſtified by a plain neceſſity. Therefore, even if the Serjeant at Arms had authority by law to call in his aid the military in an extreme caſe, he muſt fail in ſhewing ſuch an extremity upon this occaſion. The plaintiff was not indictable for refuſing to open his door for the execution of this proceſs, though the officer might break it open if the law gave him authority to do ſo. But what right had the defendant to enter the plaintiff's houſe, when broken, with above 150 ſoldiers, and with that force to ſeize him and take him to the Tower in the manner in which it was done? It may be ſaid that it was neceſſary on account of the heat and inflammation of the public mind in reſpect of theſe proceedings to call out the military to preſerve order out of doors; but that would not juſtify the officer in taking a large band of ſoldiers into the plaintiff's houſe, in order to execute the proceſs there, where no reſiſtance was oppoſed to him beyond the ſhutting of the outer door againſt his entry in the firſt inſtance. If other perſons out of doors, with whom the plaintiff had no connexion, were rioting, that would not warrant the uſe of unneceſſary violence and terror againſt him. Admitting that it was neceſſary to force into the houſe in order to execute the proceſs, it was not neceſſary to do this with a band of ſoldiers. There was no inſtance before this of the breaking of a man's houſe in order to execute the proceſs of the Houſe of Commons, nor of the execution of ſuch proceſs by the aid of a military force: the plaintiff therefore might well have imagined at the time, that he had a right to ſhut his door againſt the officer; and the force uſed to overcome this, which was the only reſiſtance offered on the part of the plaintiff,

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plaintiff, was in the words of the replication, "improper, excessive, and unnecessary for that purpose;" and it was done "in an unreasonable manner, and more violently than was necessary or proper for the execution of the warrant." If so, the defendant is a trespasser: and the law considers every man, who in executing a process is guilty of any excess, as a trespasser from the beginning: though in measuring the quantum of damages, it may be admitted that there is a great difference between those who without pretence or colour do a wrongful act, and those who are only guilty of an excess in doing a legal act.

Evidence.

The plaintiff's counsel then examined the witnesses on his behalf; and the substance of the case as proved by them, and by such of the defendant's witnesses who spoke to the personal communications between the plaintiff and the defendant or his deputy; which serves to fill up the chasms in the plaintiff's evidence, and to render the whole account consistent and intelligible; was as follows:— The warrant, being admitted, was dated the 6th of *April* 1810. On the morning of that day (*Friday*) Mr. *Colman* called at the house of Sir *Francis* in *Piccadilly*, and not finding him at home sent Mr. *Clementson* his deputy with a letter to him in the course of the same morning, which letter was as follows: "Sir, Having received a warrant from the House of Commons, and an order from the Speaker to wait upon you to convey you to the Tower, I called at your house this morning at 9 o'clock, and was informed you were not at home. I shall be much obliged to you to let me know when I can see you, that in doing my duty as Serjeant at Arms, I may not be deficient in paying every proper attention and respect to you, wishing to consult your convenience as to the time and mode of your removal." (Signed) *F. J. Colman*. Sir *Francis* returned for answer on that day; "Sir, On my return from

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Wimbledon I found your polite letter, and ſhall be at home to receive you at 12 to-morrow." (Signed) *F. Burdett.* Mr. *Colman* called again between 7 and 8 o'clock in the evening, when he ſaw Sir *Francis*; and the ſubſtance of the converſation between them at this time was to this effect. Mr. *Colman* ſaid he came to arreſt Sir *Francis*, and that he had been reprimanded by the Speaker for not arreſting him in the morning. He produced the warrant, and gave it into Sir *Francis*'s hand, and expreſſed a hope that Sir *Francis* would then go with him. Sir *Francis* inquired if Mr. *Colman* had any body with him, who anſwered that he had only another gentleman below. Sir *Francis* ſaid he thought that the warrant was illegal, and he ſhould not obey it, and returned the warrant. Mr. *Colman* endeavoured to perſuade him to go, but Sir *Francis* refuſed; and finally Mr. *Colman* went away. Sir *Francis* offered to ſend a letter by him to the Speaker, but Mr. *Colman* declined carrying it; and it was taken to the Speaker by Mr. *Jones Burdett*, the brother of Sir *Francis*. This letter was read in the courſe of the defendant's evidence; but it is ſufficient to ſtate that Sir *Francis* therein declared his opinion that the warrant was illegal, but that *to ſuperior force he muſt ſubmit.* The next morning (*Saturday*) between 6 and 7 o'clock, Mr. *Clementſon* called at the houſe of Sir *Francis*, with Mr. *Wright* the meſſenger, and a conſtable, for the purpoſe of arreſting him in purſuance of the warrant; but was informed by the porter that Sir *Francis* had left his houſe the preceding evening, and was not then at home: in conſequence of which information Mr. *Clementſon* returned to Mr. *Colman*, and they proceeded, accompanied by the high conſtable and a police officer, to the houſe of Sir *Francis* at *Wimbledon*; but not finding him there, they returned immediately to town. About 2 o'clock the ſame day Mr. *Clementſon* called again at the

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houſe of Sir *Francis* in *Piccadilly*: the door was opened with a chain, and ſhut again by the porter as ſoon as he knew who it was. After waiting at the outſide ſome time longer, Mr. *Clementſon* knocked again, and was let in by another ſervant; but the porter ſoon returned to the hall, and turned him out again. The porter, it appeared, received orders in the courſe of *Saturday* to keep the door faſt, and not to let in Mr. *Colman* or any body from him; and for the moſt part of that day, and through the *Sunday*, and till the houſe was forced on the following *Monday*, the chain of the outer door was up, and the door remained barricadoed: and orders were given on the *Sunday* in particular, in the preſence of Sir *Francis*, that no perſon ſhould be permitted to enter from without unleſs they broke in by violence. About 8 o'clock on the *Sunday* Mr. *Colman*, attended by Mr. *Clementſon* and ſeveral police officers (without the military) went again to the houſe and tried to gain admittance at the door, but without effect: the door was not opened. They left perſons to watch the door, and remained in the neighbourhood, but no opportunity of entering offered in the courſe of *Sunday*. On the *Monday* morning preparation was made for forcing the door; previous to which Mr. *Colman* demanded admittance for the purpoſe of executing the Speaker's warrant; but without effect. About 10 o'clock on that day, ſome of Mr. *Colman*'s aſſiſtants, followed by ſeveral ſoldiers, forced their way into the houſe of Sir *Francis*, by breaking through a window in the area, uſing no more force than was neceſſary to obtain an entrance. About 150 ſoldiers, (according to the plaintiff's witneſſes,) but according to the defendant's witneſſes 50 or 60 at moſt, armed with their muſkets, were immediately afterwards introduced and marſhalled in files in the entrance hall, for the purpoſe of keeping a clear paſſage from the outer

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outer door to the bottom of the ſtair-caſe leading up to the drawing-room where Sir *Francis* and his family and friends were ſitting. There were alſo a few conſtables with ſtaves in the hall. Mr. *Colman* and his deputy, without any ſoldiers, proceeded up the ſtairs into the drawing-room, when Mr. *Colman* informed Sir *Francis* that he was come to arreſt him under the warrant, which was produced and read to him. Sir *Francis* diſputed the legality of the warrant, and inquired if either of the ſheriffs were there to protect him. Mr. *Colman* ſaid that it was of no uſe for Sir *Francis* to reſiſt, as he had a great military force to take him in caſe he would not go without, and begged him to go quietly. Sir *Francis* deſired Mr. *Colman* in the King's name and in the name of the law to deſiſt; ſaying that the warrant was illegal, and that they muſt uſe force. The arreſt was then made by two perſons laying hold of Sir *Francis* by Mr. *Colman*'s orders; and he then, finding it impoſſible to make any reſiſtance, was conducted down the ſtairs quickly, through the files of ſoldiers in the hall, to a coach which was ready at the door, into which Sir *Francis* and his brother, Mr. *Clementſon* and another aſſiſtant, got; Mr. *Colman* accompanying them on horſeback; and in this way they proceeded with a guard of horſe through the ſtreets, which were lined with immenſe crouds of people all the way, to the Tower, where Sir *Francis* was delivered into the cuſtody of the Earl of *Moira*, as Lieutenant and Conſtable of the Tower, by virtue of the other warrant of the Speaker. There was no other reſiſtance made by Sir *Francis* to the execution of the warrant by Mr. *Colman*, except keeping the outer door ſhut againſt him; and it was proved by Mr. *Jones Burdett* and other witneſſes that Sir *Francis* received the greateſt civility and attention from Mr. *Colman* in the manner and time of exe-

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cuting the warrant, confiftently with the duty of his office; and that Sir *Francis* experienced no infult or inconvenience in the courfe of his conveyance from his houfe to the Tower.

It appeared further, upon the crofs-examination of the plaintiff's witneffes, that from the *Friday*, in part, after Mr. *Colman* had been to the houfe of Sir *Francis* in *Piccadilly* with the warrant for arrefting him, and more decifively from the morning of the *Saturday*, before the military came there, until the time when Sir *Francis* was carried away to the Tower, there was a confiderable mob collected before his doors and in the ftreets adjoining, from time to time hallooing and fhouting "*Burdett* for ever;" obliging paffengers to pull off their hats as they paffed the houfe, or pelting them, their carriages and horfes, with dirt, if they did not. That the military were called out on the *Saturday*, and pofted oppofite the houfe and in parts adjacent. The increafing numbers and violence of the mob throughout the *Saturday* and *Sunday*, and on the *Monday* morning, were fpoken to more particularly by the witneffes on the part of the defendant.

On the clofe, however, of the plaintiff's evidence; Lord *Ellenborough* C. J. afked *Shepherd* Serjt. to point out what part of the juftification he contended was not made out upon the evidence already given, in order that the Attorney-General might point his attention to that part, and thus fhorten the difcuffion. In anfwer to which he firft fuggefted a doubt, whether the defendant had a right to execute the warrant by means of a military force. But the defendant (his Lordfhip obferved) had infifted in his juftification on his right to call in aid *foldiers*, eo nomine, in the execution of the warrant; and if it had not been lawful for him to ufe foldiers at all for that purpofe; the plaintiff fhould have demurred to the plea: inftead of which

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which he had only relied in his replication on an excess, that the defendant with such military force as was improper, excessive, and unnecessary for the purpose, in an unreasonable manner, and more violently than was necessary or proper for the execution of the warrant, broke and entered the plaintiff's house. Wherein then does the excess consist, and what part of the justification do you say remains unanswered by the plaintiff's own proof?

Shepherd Serjt. thereupon observed, that admitting that by law soldiers might be used for such a purpose if necessary, still he was at liberty upon this issue to contend, that no necessity in fact existed in this case for using the military at all, for the purpose of making the arrest: but if it did, at all events it was a question for the jury to consider whether the number of the soldiers used, and the manner of using them, in making the arrest in the house, were not an excess beyond any reasonable necessity which the occasion called for. That even in the case of a sheriff who has the acknowledged power of calling out the posse comitatûs armed to assist him in the execution of process if resisted, yet it would be a question for a jury, whether in a particular case he had not exerted that power unnecessarily and oppressively against a particular individual whom he was authorized to arrest.

The Attorney-General (who was assisted by *Garrow*, *Dampier*, *Abbott*, *W. E. Taunton*, and *Richardson*,) then addressed the jury upon the whole case before them, in the course of which he stated the question for them to be whether the Serjeant at Arms unnecessarily and wantonly carried a large military force to Sir *Francis Burdett*'s house to execute the warrant; or whether in the execution of it in that manner, his object was only to secure the preserva-

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tion of the peace by the force which he took to his aid, and whether that force was not neceſſary and proper under the circumſtances? He obſerved, that it would be no anſwer to ſhew, even if the fact would have borne it out, that the officer might perhaps have executed his warrant with a leſs force than he took with him; for the public peace was not to be hazarded upon any calculation of that ſort. If a peace officer apprehend reſiſtance to the execution of proceſs with which he is charged, he ought to take ſuch a force with him as will not only with certainty overcome it if made, but will alſo prevent the attempt from being made: he is not to put himſelf and the public peace in a ſtate of dubious conflict with thoſe who meditate reſiſtance. Without diſcuſſing whether the Serjeant at Arms could enforce the aſſiſtance of others in executing the warrant of the Houſe of Commons, becauſe it is unneceſſary on this occaſion; there can be no doubt that he himſelf was bound to execute it, and that whoever did aſſiſt him was warranted by law in ſo doing: and ſo far the defendant's juſtification ſtands admitted upon this record; for the plea ſtates that upon the refuſal and omiſſion of the plaintiff to open the outer door to the Serjeant at Arms, he *with the aid and aſſiſtance of the ſaid ſoldiers and men* broke open the window, &c.: and if he had no right to avail himſelf of ſuch aſſiſtance, and the aſſiſtance itſelf were illegal, the plea ſhould have been demurred to as bad in law; inſtead of which the plaintiff only replies an exceſs in the degree. The only queſtion therefore which can be made is whether the defendant called in an improper and exceſſive force to execute the warrant, and uſed it in an oppreſſive and outrageous manner. In conſidering which, it is to be kept in mind that the duty of the Serjeant at Arms was not to finiſh with laying his hands upon his priſoner and taking him

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him into his custody, but was to continue till he had safely lodged his prisoner in the custody of the Lieutenant of the Tower, as he was directed by his warrant to do: and it was his duty, looking to all the circumstances which had taken place or might be expected, to provide a sufficient force to do this with entire safety to himself and to those who assisted him; such a force as would render all resistance hopeless, and prevent bloodshed and mischief, and not merely be just sufficient to effect his purpose at the imminent hazard of contest. The conduct of the Serjeant at Arms, therefore, in taking a military force with him large enough to overawe those who were disposed to tumult amidst the immense multitudes assembled upon the occasion, was not only legal and justifiable, but prudent and commendable. The question, he observed, had been erroneously stated to be, not between Sir *Francis Burdett* and Mr. *Colman*, but between Sir *Francis Burdett* and the House of Commons; for as the issue was framed in this case, the question turned upon the mode in which the warrant was executed, which it is the peculiar duty of the officer to take care shall be done in a legal manner, so as not to exceed the bounds of his authority. But he stated that he was ordered by the House to defend the Serjeant at Arms on that day, if it appeared, as it already did in proof, that he had done no more than his duty in executing their warrant in the manner he had done.

The Attorney-General then commented upon the evidence which had been given on the part of the plaintiff of the communications which had taken place, and the conduct which had been observed, between Sir *Francis* and Mr. *Colman* or his assistants up to the time of the actual arrest, and upon the personal curtesy and spirit of accommodation towards Sir *Francis*, with which it was

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admitted that the whole proceeding had been conducted by Mr. *Colman*. In truth, he said, the only error imputable to him was that he did not execute the warrant in the first instance, as he might have done. He also touched upon the facts already in proof as to the determination expressed by Sir *Francis* to resist the execution of the warrant, and the preparation made for that purpose by securing his house against the entry of the Serjeant at Arms; and upon the numbers and riotous disposition of the mobs collected and increasing during the transaction, which rendered the presence of the military absolutely necessary for securing the execution of the warrant, and preserving the peace of the metropolis: and he opened the further proof of these facts, which he felt it to be his duty in a case like the present to lay before the jury without reserve, in order that no shadow of doubt might remain as to the propriety of that interference.

Evidence.

The defendant's witnesses were then called; and the numbers and conduct of the populace during this transaction were spoken to by several magistrates, officers of the Guards on duty, and others present, whose situations enabled them to observe these matters. From their testimony it appeared that the mob began to collect in numbers, on the *Friday*, about Sir *Francis Burdett*'s house in *Piccadilly*, opposite the canal in the *Green Park*; and that in the evening of that day a large party of them proceeded from thence to Lord *Castlereagh*'s house in *St. James's-Square*, which they attacked, and broke all the windows of, and did other damage to it. The military were at last sent there to prevent further mischief. Other parties of the mob went to the houses of other ministers and members of parliament who had taken an active part in the proceedings relative to Sir *Francis*

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Burdett, and did the like mifchief. In the courfe of *Saturday* the mob grew more numerous and outrageous, particularly before and near Sir *Francis*'s houfe; hooting and fhouting, and pelting with mud and ftones the carriages and perfons of all thofe paffing that way who would not take off their hats and cry "*Burdett for ever*." The proclamations of the riot act were read twice at leaft on that day, and again on the *Saturday*, without effect; and then the military were called in, both horfe and foot, who were drawn up in the ftreet immediately oppofite the plaintiff's houfe in *Piccadilly*, and lined the ftreet for fome diftance on each fide; and they continued on duty from that time till after Sir *Francis* was taken to the Tower on the *Monday*. The mob however ftill continued to increafe in numbers and boldnefs throughout the *Saturday* and *Sunday*: they oppofed and attacked the military in different parts along *Piccadilly* and *St. James's-Street* with miffile weapons of various kinds; and, as one of the magiftrates expreffed himfelf, their temper grew very dangerous to the public peace. In the courfe of the *Saturday* night there were feveral fhots fired by them at the foldiers on duty, particularly near *St. James's-Palace*, where two of the Guards were wounded.

Evidence of acts of violence of the mob, committed in parts adjacent, though out of view and hearing of the plaintiff in his houfe, appearing to be connected with the fame purpofe, as actuated thofe about the plaintiff's houfe, admitted to fhew the danger and difficulty of exe-

It was objected on the part of the plaintiff to this and other evidence of acts of violence committed by the mob at fome diftance from Sir *Francis Burdett*'s houfe, fuch as their conduct at Lord *Caftlereagh*'s houfe in *St. James's-Square*, that as the plaintiff could not be fuppofed to know what was paffing in other parts of the town, he ought not to be prejudiced by it; but that at leaft the evidence of acts of violence committed by perfons out of doors over whom he had no control, if admiffible at all, ought to be confined to the immediate neighbour-

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cuting the warrant by force against the plaintiff in his own houſe, without the aid and protection of the military.

hood of his own houſe. But Lord *Ellenborough* C. J. obſerved, and the reſt of the Court aſſented to it, that general evidence of the diſpoſition and conduct of the mob in other parts adjacent, appearing as it did to be connected with the ſame purpoſe as actuated thoſe collected at the principal ſcene of action about the plaintiff's houſe, was evidence as to the danger and difficulty of the defendant's executing the warrant without the aid and protection of the military. But they all agreed that general evidence only of this deſcription was proper to be received; and therefore they ſtopped any further inquiry as to particulars. The temper and ſteadineſs of the ſoldiers however, under ſuch groſs provocations and inſults, received, as it juſtly deſerved, high commendation from all parties.

The ſeveral witneſſes, as well the magiſtrates as the officers on duty, who were on the ſpot the greater part of the time, and had the beſt opportunities of watching and knowing the numbers and diſpoſition of the immenſe multitudes aſſembled on this occaſion, all agreed, that, without the aſſiſtance of a military force, the Serjeant at Arms could not after the *Saturday* morning, with any prudence or ſafety to himſelf or his immediate aſſiſtants, have ventured to arreſt Sir *Francis* in his houſe by forcing the door; and it appeared to them quite impoſſible to have conveyed him to the Tower by aid of the civil power only; and, as ſome thought, Sir *Francis* himſelf would have been expoſed to danger in the conflict, without the protecting military force provided in aid of the Serjeant at Arms. One of the magiſtrates alſo ſtated that on the *Saturday* the Serjeant at Arms went to the ſheriffs, then at the *Glouceſter* Coffee-Houſe, near Sir *Francis*'s houſe, ſhewed them his warrant, and demanded their aſſiſtance for

for its execution; but that the sheriffs would give no distinct answer, but said that they would retire and consider of it in their own room: and that on the same afternoon, when that part of the street had been cleared by the troops, 20 or 30 men remained opposite Sir *Francis Burdett*'s house, who said they were placed there by the sheriffs. How long those men continued there did not appear, nor whether they gave or offered any assistance to the Serjeant at Arms in the execution of the warrant. 1811. BURDETT *against* COLMAN.

Shepherd Serjt., in reply, contended that however the evidence given on the part of the defendant might shew that the military, when called out, had conducted themselves with exemplary temper and forbearance under the insults and provocations which they afterwards received from the rabble, when endeavouring to prevent them from committing acts of outrage; yet it did not prove the necessity of calling in aid the military in the first instance, for the purpose of enabling the Serjeant at Arms to make the arrest. Nothing is more common than for a croud of persons to be collected in this town, upon the notion, however mistaken, that some illegal act is about to be done; and when collected they are too apt to fall into improper conduct; such as, upon this occasion, the obliging persons passing by Sir *Francis Burdett*'s house to pull off their hats and cry *Burdett for ever*: but the appearance of the military upon such an occasion more frequently increases than allays the irritability of the populace: and without imputing any intentional wrong to the magistrates who called in aid the military, it certainly had that effect upon the present occasion. The question therefore was not whether in the temper and situation of the town on the *Monday* when the arrest was made, *Reply.*

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made, which was the third day after the military had been called out, it would have been prudent or even practicable to have conveyed Sir *Francis* to the Tower from his own houfe without a military efcort to preferve the peace and keep off the mob; but his complaint was that the Serjeant at Arms broke into his houfe with a military force in order to make the arreft, though the plaintiff made no other oppofition to it than that of faftening his outward door; which force both in fpecie and in degree was unneceffary and exceffive: his complaint was that the defendant ufed a military force in the execution of civil procefs. The declaration of Sir *Francis*, that he fhould fubmit only to fuperior force, coupled with all the reft of his conduct and declarations to the parties concerned in the arreft, could only have been underftood in the fenfe which he avowed on every occafion throughout the tranfaction, not as intimating any intention to employ bodily force or offenfive weapons in battle array, in order to refift the arreft; but in fhutting his outer door, as he conceived at the time he had a right by law to do, againft the officer, and putting him to ufe fuch actual force as he thought himfelf warranted to ufe in order to overcome that fpecies of negative refiftance: it was no more in effect than faying that he would not voluntarily fubmit to the arreft, but would put it to the teft of the law, if the officer ventured to break open his door: but that does not fhew the neceffity of the officer's ufing a military force for the purpofe. He relied on there being no evidence to connect the plaintiff with the conduct of the mob out of doors: no one act of theirs emanated from him; nor did he do any thing to folicit or encourage their affiftance: on the contrary, it was in proof that he had purpofely kept out of view of the people while he continued in his own houfe: whatever refiftance

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resistance they testified to the execution of the warrant was purely spontaneous; though after the opinion already declared by the Court, he said, he could not contend that the conduct of the mob out of doors did not bear upon the conduct of the defendant, so far at least as related to the preparing a military escort to conduct the plaintiff from his house to the Tower. He argued, that though the warrant called upon *all other persons*, besides mayors, &c., and other civil officers, to assist the Serjeant at Arms in the execution of the warrant; yet at all events the officer could only be authorized to call in the military in the last resort, after the civil power had been called in and had failed: whereas the military had been called in here to assist in making the arrest before any trial of the efficacy of the civil power. And he contended that the necessity for using such a force to make the arrest did not exist in this case, and that the jury were to judge of that necessity. In conclusion, the learned Serjeant said, that notwithstanding the weight of the House of Commons, who had sent the Attorney-General to defend their officer against this action, he had used the liberty of an advocate with boldness in the execution of the duty which he owed to his client; but, he hoped also, without using it as a cloak for maliciousness.

Lord ELLENBOROUGH C. J. then addressed the jury. Gentlemen of the jury,—It is highly honourable, and useful to the administration of justice, that advocates at the bar should possess the talents and firmness that the learned Serjeant who has just sat down has this day displayed, in maintaining causes which are confided to them by their clients: at the same time it is not less honourable to themselves, and useful to the administration of justice, (and without which justice could hardly be

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well adminiſtered,) that in the diſcharge of that duty they ſhould maintain a correct obſervance of decorum and deference to the rules of law. Upon this occaſion he has certainly been obliged, by the neceſſity of the caſe, to preſs the topics preſented to him to the extreme; at the ſame time that he has conducted his argument with a due reſpect for the authority of the laws, and towards thoſe who adminiſter them. The queſtion before you, Gentlemen, is one of the ſimpleſt and narroweſt that can be propoſed for the conſideration of a jury, and which I will preſently proceed to ſtate. It is no queſtion to be decided by you upon this occaſion, whether the Houſe of Commons have the privileges they claim: that they may commit for contempt is already decided, and muſt continue to be conſidered as law till it is otherwiſe decided by a ſuperior tribunal: but upon this record no ſuch queſtion occurs for you to try. It was pleaded by the defendant, in bar of the treſpaſs complained of, that he was authorized by a warrant from the Speaker, granted under a reſolution of the Houſe that the plaintiff had been guilty of a contempt of their privileges by the publication of a certain libel, to arreſt and convey him to the Tower; and that in the execution of that warrant he took the aſſiſtance of ſoldiers, and conveyed him in the manner charged in the declaration to the Tower, and delivered him over to the Conſtable of the Tower. If that were not a legal defence, it was competent to the plaintiff to have demurred to that plea, and to have queſtioned the right of the defendant to do the whole of that which is ſtated in the plea: but, by pleading over, all that is admitted by the plaintiff; he admits, that all the treſpaſſes are covered by the warrant, as fully as if his counſel had now riſen in his place and ſaid, I admit the warrant to be legal, that the

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Speaker was authorized to grant it, and I admit that the circumſtances which are ſtated to be treſpaſſes are covered by that warrant and juſtification. But in anſwer to the plea he ſays this, which is the only queſtion for your conſideration, that the defendant executed the warrant with *ſuch military force* as was improper, exceſſive, and unneceſſary for the execution of the warrant; which admits in the terms of it, that *a military force* was proper, but objects only that, with *ſuch military force* as was improper, exceſſive, and unneceſſary for that purpoſe, and in an unreaſonable manner, and more violently than was neceſſary or proper for the execution of the warrant, the defendant, to the great terror and alarm of the ſaid Sir *Francis*, broke open the window and window-ſhutters of his meſſuage, and through the ſame broke into and entered the ſaid meſſuage, and made a great noiſe and diſturbance therein, and made the aſſault upon the plaintiff, and arreſted him, &c. Upon that, the defendant takes iſſue, and thereby ſays in effect, that the military force he uſed was a degree of military force that was proper, and not exceſſive; that it was neceſſary, and that he did not do it in any unreaſonable manner, or more violently than was proper and neceſſary. That is the ſimple and plain point which you have to try, whether there was any exceſs upon this occaſion in the application and uſe of a force which is admitted to be in its nature and quality legal. Now it is objected, that there was unneceſſary harſhneſs and oppreſſion in the application and uſe of military at all, either in entering the houſe for the purpoſe of making the arreſt, or in afterwards conveying the plaintiff to the Tower. You will recollect, however, that, according to the evidence, theſe were, if I may uſe the expreſſion, immediately conſecutive operations; for as ſoon as Mr. *Colman* had entered the houſe

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and made the arreft, it was his bufinefs to convey Sir *F. Burdett* to the Tower; and it is not pretended that it would have been practicable to have conveyed him to the Tower at that time without the military: nay, it is proved that he could not have been conveyed there without fuch force. The military force was not ufed to effect the entry: but it is faid, that the houfe was broken and entered, and that the foldiers, who were to be the inftruments of his conveyance, paffed through the entrance fo made. They did not afcend the ftaircafe, according to the evidence of Mr. *Clementfon*, to incommode the family; but they were ftationed and ranged in the hall in two rows, through which Sir *F. Burdett* paffed in order to his conveyance to the Tower. Now what application has the military force to the entry? None at all. Not that it is not competent to ufe military force, or any force which may be neceffary for the execution of a warrant of this kind: the degree and quality of the force muft vary according to the exigency of the cafe. The firft duty of the officer, who is entrufted with the execution of procefs, is to take care that it is executed effectually, and with as little injury to the individual or to the public as may be; now I fhould wifh the wit of man to devife any mode by which injury, either to the individual or to the public, could have been more effectually prevented than the mode which was adopted. Then, as to the application of this military force, you will recollect what was the ftate of the capital at that time; and then it becomes material to confider, what was the fort of expectation under which Mr. *Colman* could apply himfelf to the execution of the warrant. If Mr. *Colman* be blameable in any thing with refpect to the execution of the warrant, and I think he is fo, it *is not on the fcore of harfhnefs*. If this warrant had been put into the hands of

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any of thofe inferior officers whofe minds were not endowed with the high, gentlemanly, and honourable feelings which Mr. *Colman* has fhewn, there would not have been four hours interval between the time of granting the warrant and the time of the plaintiff's incarceration. The ordinary peace officer or bailiff would have inftantly proceeded to the place of the plaintiff's refidence, and taken him into his cuftody, without any injury or danger to the perfon who was the object of his warrant; with a fuperior firmnefs and a lefs degree of that mifchievous lenity which was exhibited in the very hazardous delay which took place; for mifchievous I muft call it, if it be likely to lead to and end in public tumult and danger; and the plaintiff would, without doubt, have been fafely and immediately conveyed to the place where he was ordered to be confined. Inftead of that, how does Mr. *Colman* conduct himfelf? He writes to know when he fhall wait upon Sir *Francis:* and you will confider what was the fort of force he had reafon to expect would be oppofed to him, both from that which paffed within doors and without: and whether he would not have been highly criminal to the public, if he had not at laft taken a competent force to execute the bufinefs that had been entrufted to him. Gentlemen, I will give you the evidence on the part of the plaintiff, and the fubftance of that on the part of the defendant, as it bears on the queftion refpecting the application and ufe of the military force. Firft, there is the letter of Mr. *Colman* to Sir *Francis;* and this is the letter of a perfon who is charged with having exceffively, improperly, and harfhly ufed force towards the plaintiff. He fays, " Sir, Having received a warrant from the Houfe of Commons, and an order from the Speaker to wait upon you and convey you to the Tower, I called at your houfe this morning at 9 o'clock, and was informed

you

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you were not at home. I ſhall be much obliged to you to let me know when I can ſee you, that in doing my duty as Serjeant at Arms, I may not be deficient in paying every proper attention and reſpect to you; wiſhing to conſult your convenience as to the time and mode of your removal." In this, certainly, I think the defendant went out of his way; for being an officer charged with the duty of arreſting another, he ought, at all events, to have put himſelf in a condition to execute that duty immediately, by arreſting the plaintiff without ceremony; conducting himſelf at the ſame time no doubt with as much curteſy in the manner of executing the arreſt as was proper. The anſwer of Sir *F. Burdett* is this: "Sir, On my return from *Wimbledon* I found your polite letter, and ſhall be happy *to receive you* here at 12 o'clock to-morrow. *Francis Burdett.*" I will not take upon me deciſively to pronounce, if I had received this letter, in what manner I ſhould have conſtrued it; though it rather appears to me to import a promiſe that he ſhould be at home at 12 o'clock for the purpoſe of receiving the Serjeant at Arms to execute the warrant upon him: but it might be (for there is nothing in the terms of it which abſolutely excludes his ſo contending,) that he meant only to intimate to the Serjeant at Arms that he ſhould be ready to receive him at that time, without declaring that he ſhould be then ready to ſubmit to the authority of the warrant under which the Serjeant at Arms ſhould act. In his letter to the Speaker, written on the ſame day, he ſays, "Your warrant, Sir, "I believe you know to be illegal; I know it to be ſo; "to *ſuperior force* I muſt ſubmit." Now it has been ingeniouſly argued by the learned Serjeant, that the term *ſuperior force* means only the ſuperior authority and commanding influence of the Houſe of Commons: but if you conſider

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consider the words in connexion with the language used by him, as proved by Mr. *Jones Burdett* and Mr. *Clementson*, and coupled with the circumstance of the chain upon the door, and the order to admit nobody into the house; we must understand the words *superior force* in their more coarse and literal sense. Mr. *Jones Burdett* says that when Mr. *Colman* came to him he expressed a hope that Sir *Francis Burdett* would go with him; and he said he had been reprimanded by the Speaker for not arresting him in the morning. Sir *Francis Burdett* then enquired *if he had any body with him?* And it is for you to construe this conversation, whether the meaning of it was not this? I want to know whether you are in a condition to support your warrant; whether you are strong enough or too weakly assisted to enforce it. Mr. *Colman* answered, I think, that he had only another gentleman below: and then Sir *Francis Burdett* said he thought the warrant was illegal; and he should not obey it. This answer being given after he had enquired whether Mr. *Colman* had any body with him; what could he have meant but to intimate that he intended personally to resist, in the most effectual way in his power, the execution of the warrant? The issue of this conversation is that Mr. *Colman* appeared extremely distressed at being under the necessity of retiring without executing the warrant at that time, and went away. But why did he not execute it then? Because Sir *Francis Burdett* had said that he would not obey it; and therefore if Mr. *Colman* attempted to do so, it must be in some degree a personal conflict. But there is some further language of the plaintiff, proved by the same witness, that can leave no doubt in your minds that the plaintiff meant resistance by force; for the witness says, I heard no orders given; there was no other resistance than

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than my brother's ſaying that the warrant was illegal, *and they muſt uſe force:* this was on the *Monday*. Now when he ſays they muſt uſe force, what is it but ſaying this; I may be obliged to yield, but to force only will I yield: you muſt uſe force? So Mr. *Clementſon* ſays; Sir *Francis* diſputed the legality of the Speaker's warrant, and ſaid that he ſhould reſiſt it, and they muſt uſe force, or words to that effect. Theſe were intimations given by Sir *Francis Burdett* prior to the time when he was eſcorted to the Tower; and I aſk you Gentlemen, if, having been ſo admoniſhed, and knowing the ſtate of the capital; knowing that on the *Friday* night there had been ſuch outrages committed, as have been ſtated, at the houſe of a Noble Lord; and at *Reddiſh*'s Hotel, the ſuppoſed habitation of Mr. *Lethbridge;* when on the *Saturday* and *Sunday* there were ſuch tumultuous aſſemblies in the ſtreets, when the military were ſo much aſſaulted and ill-treated, and in two inſtances ſoldiers were wounded: I aſk, would the Serjeant at Arms have been excuſeable to the Houſe of Commons; to the public; in point of humanity to the populace; and even to the individual himſelf whom he was about to arreſt; if he had not taken with him ſuch an overawing force as was ſure to effect his purpoſe of arreſting the perſon of Sir *Francis Burdett* and conveying him to the Tower. If indeed it had been an ordinary caſe, in which the preſence of one conſtable quietly appearing before him, might have been ſufficient to arreſt and convey the plaintiff to the place to which he was to be removed; and without any reſiſtance or mob the Serjeant at Arms had collected and ſurrounded him with all this force and military array, and collected ſo many gazers, for the purpoſe of exhibiting the plaintiff with inſult, to his mortification and humiliation; it would have been a wanton abuſe of power,

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and would not have been justifiable: but, on the contrary, there was every possible curtesy and attention shewn to the plaintiff: and the plaintiff's counsel has this day placed Mr. *Colman* before you as one on whose honour, manners, and feelings, as a gentleman, no imputation could be cast: and with respect to his humanity, you have the testimony of a very respectable gentleman, Mr. *Jones Burdett*; who, in answer to a question put to him, declared that his brother experienced no kind of insult or inconvenience in the course of his conveyance to the Tower.

Then, Gentlemen, it seems to me that it would be only wasting your time to ask you, whether, under these circumstances, there was any excess in the manner of executing this warrant, as it has been detailed to you, on account of which Mr. *Colman* can be considered in any degree culpable; that is, for having in the first place a protecting force of about 60 soldiers introduced and drawn up in the hall of the plaintiff's house, to protect himself and his assistants who were to execute the warrant from violence; and for the purpose of securing a safe passage out of the house to the carriage in which his prisoner was to be conveyed; and in the next place, to protect themselves and the person upon whom they were to execute it in their way to the Tower. Gentlemen, if there be any part of the evidence (and I am afraid of omitting any part of it) that you may feel necessary to have repeated, I am entirely at your pleasure, whether or not I shall read every part of it in detail; but I trust I have not omitted a word that is material: if, however, there be any part that you wish to have read, I am prepared to execute that duty: but the question is merely, whether there has been such an excess as to constitute this person a trespasser, by having vexatiously used a military force for

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for any of the purpofes of the execution of the warrant, for which fuch force was wholly unneceffary? If you have the leaft doubt, or if you think the evidence of any one witnefs will, if brought again to your recollection, in any manner affect your view of the cafe, I fhall be moft ready to read the whole of it, and to fubmit it again to your confideration: but at prefent I have I think done enough to put you fully in poffeffion of the real queftion you have to try, and the teftimony upon which it refts; which queftion, in fubftance, is whether this defendant has conducted himfelf blamelefsly and like a gentleman in performing the duties impofed upon him: or whether, on the contrary, he has abufed any of the powers he had, or neglected any of the duties which belonged to him to difcharge in his conduct towards the perfon of Sir *Francis Burdett*, for the purpofe of offering infult or vexation to him in any degree or refpect whatever? Gentlemen, you will confider of your verdict.

The jury, without hefitation, found a verdict for the defendant. A queftion was then made at the bar as to the manner in which the verdict fhould be entered; when it was propofed that it fhould be entered thus; finding, in fubftance, upon the general iffue, that the defendant was guilty of fuch of the trefpaffes laid in the declaration as are mentioned in the introductions to the fpecial pleas and thereby juftified, and not guilty of the refidue: and finding the other iffues, upon the exceffes alleged in the replications, for the defendant.

The other caufe which ftood for trial againft the Earl of *Moira* went off for default of jurors.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Fifty-first Year of the Reign of GEORGE III. 1811.

In the Matter of JOHN CHARLES, a Bankrupt.

Friday, Feb. 1st.

A plaintiff in an action for a breach of promise of marriage, having recovered above 100*l.* damages against a trader, who, between verdict and judgment, committed an act of bankruptcy; held that the debt due upon the judgment after it was entered up was not a good petitioning creditor's debt, whereon to found a commission against such trader.

A Petition in bankruptcy was presented to the Lord Chancellor by the bankrupt to supersede his commission, upon the hearing of which, in *Trinity* term 1809, his Lordship ordered the following case to be stated for the opinion of this Court: which case was argued here in last *Hilary* term.

Mary Howell, spinster, brought an action on the case against *J. Charles*, for a breach of promise of marriage; and on the 5th of *December*, at the sittings at nisi prius of the Court of King's Bench after *Michaelmas* term 1808, she recovered a verdict against him for 150*l.* damages. On the 25th of *December Charles* executed certain indentures of lease and release and assignment, dated the 22d and 23d of *December* 1808, whereby he conveyed and assigned away *all* his estate and effects to

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certain perfons in fuch indentures named, and thereby it was admitted that he committed an act of bankruptcy. On the 31ft of *January*, in *Hilary* term 1809, judgment was entered up on the faid verdict for the faid fum of 150*l.* and 133*l.* cofts; and on the 4th of *February Mary Howell* petitioned for a commiffion of bankrupt againft *Charles*, and fuch commiffion was awarded and iffued, dated at *Weftminfter*, the 21ft of *February* 1809, under which he was found and adjudged a bankrupt. The debt of the petitioning creditor *Mary Howell*, upon which the faid commiffion was applied for and iffued, was the money due to her on the faid judgment; and the act of bankruptcy, on which *Charles* was declared a bankrupt, was the execution of the faid indentures of the 22d and 23d of *December* 1808. The queftion was, whether the above-mentioned debt of the petitioning creditor was a fufficient debt in law to fupport the commiffion.

Burrough in fupport of the affirmative. The queftion arifes upon the ftat. 5 *Geo.* 2. *c.* 30. *f.* 23., which provides "that no commiffion of bankrupt fhall be iffued upon the petition of one or more creditors, unlefs the fingle debt of the creditor, &c. do amount to 100*l.* or upwards, &c. (and fo in proportion as to the debt of two or more creditors;) and the creditor or creditors petitioning for fuch commiffion fhall, before the fame fhall be granted, make an affidavit, &c. of the truth and reality of fuch their refpective debt and debts, and likewife give bond to the Lord Chancellor, &c. in 200*l.* conditioned for proving their debts, &c. and alfo for proving the party a bankrupt at the time of taking out fuch commiffion, &c.: and if fuch debt or debts fhall not be really due or owing,

 &c.

&c. then the Lord Chancellor, &c. ſhall, upon petition of the party grieved, examine into the ſame and order ſatisfaction," &c. The clauſe ſays nothing as to the time when the petitioning creditor's debt ſhall be due, but merely that he ſhall have a *debt;* the words, therefore, will be ſatisfied by having a debt of the required amount due at the time of the petition. Here the verdict, by which the amount of the debt due from *Charles* to *Mary Howell* was aſcertained to be 150*l.*, was given on the 5th of *December*, prior to the act of bankruptcy, and that debt was confirmed by the judgment given after the bankruptcy, but before the creditor petitioned for the commiſſion. The verdict, which was the conſideration of the judgment, exiſted before the act of bankruptcy. The 7th ſection, which turns on the effect of the certificate, does not touch the validity of the petitioning creditor's debt, by providing that every bankrupt conforming in the manner therein ſpecified ſhall be diſcharged from all *debts by him due or owing at the time that he became bankrupt;* and that in caſe any ſuch bankrupt ſhall afterwards be arreſted or impleaded for any *debt due before ſuch time as he became bankrupt*, he ſhall be diſcharged upon common bail, and may plead in general that *the cauſe of action accrued before ſuch time as he became bankrupt.* The cauſe of action here was the breach of the promiſe of marriage; and the damage or debt due for that breach was aſſeſſed by the verdict before the bankruptcy. Every caſe of a petitioning creditor's debt, ariſing upon a bill of exchange indorſed to him after the act of bankruptcy (*a*), aſſiſts this caſe: and it will not

(*a*) Vide *Glaiſter* v. *Hewer*, 7 *Term Rep.* 498.; and *Brett* v. *Levett*, 13 *Eaſt*, 213.

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be a sufficient answer to say, that the debt in such a case is referred to the bankrupt's original obligation on the bill, in whosever hands it was before the bankruptcy; because in several of those cases it has been shewn, that the debt in fact accrued to the petitioning creditor after the bankruptcy: but the ground of those decisions has been, that the debt existed in its original formation before the bankruptcy, though not demandable by the petitioning creditor till afterwards. If the case of the petitioning bill holder were to be considered as a mere transfer of the original debt, such debt would be transferred with all the bankrupt's rights of set-off, and other answers to the demand which he might have against the original holder: but that is not admitted: and a bill so indorsed after the act of bankruptcy has been always holden to be a good petitioning creditor's debt. The Courts must have been mistaken in the principle of all the cases from *Graham* v. *Bentham* (*a*), down to the case ex

(*a*) 2 *Stra.* 1196. and 1 *Wils.* 41. The following MS. note of this case was taken by Mr. *Short*, a cotemporary at the bar.

Graham v. *Benton*, *M.* 17 *Geo.* 2. *B. R.* "An action was brought against the defendant, *then a bankrupt*, in the Palace Court, for a debt due before his bankruptcy, and judgment was thereon given: a writ of error was brought, and then he obtained his certificate, and afterwards judgment was affirmed on the writ of error, and the defendant taken in execution for the debt and costs. The defendant moved to be discharged out of custody on the stat. 5 *Geo.* 2. *c.* 30. *s.* 13., he being in execution on a judgment given before the certificate was obtained. *Per Curiam.* The act of parliament discharges the bankrupt in two ways; one, if he have the certificate at the time of the action, when he may plead it in bar. The other is, if he have not his certificate at the time, yet he may make use of it after judgment, by applying to the Court to be discharged out of custody. The act discharges the bankrupt from all debts due and owing before he became a bankrupt. This is such a case: and though this judgment includes costs, which have been incurred since the bankruptcy, yet the plaintiff is not entitled to have the benefit of such costs, as he is not entitled to the original debt. The defendant was discharged out of custody."

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ex parte *Hill* (a), unlefs this petitioning creditor's debt be maintainable. In moft of them the queftion has been, whether the bankrupt was difcharged by his certificate from the cofts of a judgment obtained after the act of bankruptcy upon a demand exifting before, as from a *debt*; but no bankrupt can be difcharged by his certificate from a debt which, if perfected at the time, would not have made him a good petitioning creditor. In *Graham* v. *Bentham*, the certificated bankrupt was holden to be difcharged from the cofts of the writ of error, all of which were incurred after the act of bankruptcy, as referable to the debt exifting before. It follows from thence, that the creditor to whom thofe cofts were due, would have been a good petitioning creditor in that refpect if his demand had been perfected at the time by the judgment and taxation. *Blandford* v. *Foote* (b) went on the fame principle. An action was there brought againft the bankrupt after his bankruptcy on a bond due before; and after judgment obtained, the obligee died, and his executors brought a new action on the judgment: and the Court held, upon the ftat. 12 *Geo.* 3. *c.* 47. *f.* 2. (which is to the fame effect as the ftat. 5 *Geo.* 2. *c.* 30.

(a) 11 *Vef.* 646., where all the prior cafes are collected.
(b) *Cowp.* 138.; and vide *Phillips* v. *Brown*, 6 *Term Rep.* 282.

Mr. *Ford*'s MS. of the fame cafe fays, "The chief difficulty was as to the cofts given on affirmance of the judgment, which was a new debt after the certificate.

Sed, *per Curiam*, the defendant being a bankrupt, and having delivered up his effects, it was unjuft to profecute the original action: and as he had no defence againft that for want of his certificate, the writ of error was neceffary to fufpend execution till the certificate could be had. And though the cofts on the affirmance are ftrictly a new demand; yet they ought to be confidered as attendant upon and fpringing from the original one: fo the defendant ought to be difcharged from both."

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in this respect,) that the bankrupt was discharged not only from the original debt due before, but from all the interest and costs accrued since the bankruptcy. In *Aylett* v. *Harford and Another, Bail of Lowe, a Bankrupt* (a), Lord C. J. *De Grey* was decidedly of opinion, in a case where the plaintiff had obtained a verdict against *Lowe* before his bankruptcy, on which he had judgment afterwards, that he was entitled to prove under the commission not only his debt, but also his costs: and therefore having proved his debt under the commission, (but not the costs, because the commissioners refused to let him in to such proof,) the Court discharged an execution against the bail for the amount of the costs. [*Bayley* J. That was the case of a proveable debt existing before the bankruptcy.] Then came *Longford* v. *Ellis* (b), where the plaintiff had recovered damages in an action of slander; and between the verdict and judgment, the defendant became a bankrupt; and afterwards obtaining his certificate, it was moved to discharge him out of custody in execution for the damages and increased costs taxed. [He read from his own note of the case, as said by the Court—" The cause of action exists before the verdict: the moment the verdict comes, the damages are ascertained; and then the judgment is to recover the damages."

(a) 2 *Blac.* 1317.

(b) *E.* 25 *Geo.* 3. *B R.* stated in a note in 1 *H. Blac.* 29. and 1 *Cooke's Bank. L* 185.—My own note of the case, intitled *Langford* v. *Ellis*, states that the plaintiff's counsel (in shewing cause against the rule for discharging the bankrupt defendant out of execution,) urged that all the cases were cases of debt, or founded on contract, and did not apply to an action for this species of injury, which was a tort. Lord *Mansfield* C. J. The cause of action existed before the verdict; the moment the verdict comes, the damages are assessed; then the judgment is to recover the damages so assessed. *Willes* J. The moment the verdict comes the damages are liquidated. *Ashburst* J. was of the same opinion. *Buller* J. was not in court.

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mages."] Here, then, the petitioning creditor, previous to the act of bankruptcy of the trader, had obtained a verdict against him for 150*l.* damages, founded upon a prior valid consideration, and founded also upon promises, and not merely in tort, (which however would, under these circumstances, be the same thing.) In *Lewis* v. *Piercy* (*a*), the bankrupt was discharged out of execution for the costs, though the verdict was after the act of bankruptcy: but there the action was brought to recover an antecedent debt. The only case which has been much doubted is *Hurst* v. *Mead* (*b*), (on which *Watts* v. *Hart* (*c*) in C. B. proceeded,) where the defendant, who had become bankrupt, after a nonsuit at the trial of an action brought by him, but before judgment of nonsuit, was held to be discharged by his certificate from the costs of such nonsuit, as a debt incident to the action which was brought before. In the case of *Bamford* v. *Burrell* (*d*), the plaintiff's debt accrued after the act of bankruptcy, though before the commission; and that, after much consideration, was held not to be barred by the certificate: but no doubt would have been made in that case, without assuming the prior cases to be law. Most of these authorities were, it is true, canvassed by the Lord Chancellor in the case ex parte *Hill* (*e*), and doubts were thrown out by his Lordship in respect to many of them; but in the case in judgment before him, where he held that the costs could not be proved as a debt under the commission, the verdict as well as judgment was obtained *after* the bankruptcy; and that distinction is frequently adverted to throughout his

(*a*) 1 *H. Blac.* 29. (*b*) 5 *Term Rep.* 365. (*c*) 1 *Bos. & Pull* 134.
(*d*) 2 *Bos. & Pull.* 1. (*e*) 11 *Ves.* 646.

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judgment. That authority, therefore, does not conclude the present case, where the verdict which ascertained the debt, which before was uncertain, was obtained prior to the act of bankruptcy; and the subsequent judgment does not create the debt, but only authorizes the recovery of that which was before ascertained and fixed by the verdict.

Abbott, contrà, argued against the validity of the commission of bankrupt, because there was no sufficient petitioning creditor's debt existing at the time of the act of bankruptcy. The leaning of the Lord Chancellor's mind, in the case ex parte *Hill*, was evidently against many of the cases which have been cited, and therefore he sent this question to be decided at law; expressly stating, that without such an authority in support of this petitioning creditor's debt, he should decide against it (*a*). In order to found the petition, there must have been a sufficient legal debt due from the bankrupt to some person at the time of the act of bankruptcy; though it may have been afterwards (as in the case of bills of exchange and promissory notes,) assigned to the petitioning creditor. This was so clear that, before the inconvenience was remedied by the late act of the 46 *Geo.* 3. *c.* 135., if an act of bankruptcy were shewn to have been committed by the bankrupt before the petitioning creditor's debt accrued, it abrogated the commission. But if the security on which the debt arises be not assignable at law, but only in equity, as in the case of a bond, an assignee of it cannot be a petitioning creditor (*a*). [*Le Blanc* J. That is, he cannot petition in his own name.] Here it cannot be said that there

(*a*) 16 *Vef.* 256. (*b*) *Medlicot's* case, 2 *Stra.* 899.

was

was any debt due from the bankrupt to any person at the time of the act of bankruptcy; for nothing was due upon the verdict before judgment, but it is the judgment alone which creates the debt. No action could be maintained on the mere verdict; and at common law, if a plaintiff died after verdict and before judgment, there could be no recovery; but that is now cured by statute. Either a verdict or a nonsuit at the trial is only a step towards the judgment, and is in itself nothing: the progress of the suit may still be stopped after verdict by arresting the judgment. It is argued that this is a debt by relation from the judgment to the verdict; but however that relation might suffice to make a debt proveable under the commission, it is not sufficient to make a petitioning creditor's debt, which must be a perfect legal debt at the time of the act of bankruptcy. Suppose an action is brought against a messenger under the commission who had seized the goods of the bankrupt, he must state in his plea, that there existed a debt in the petitioning creditor at the time of the act of bankruptcy; and in case it arose upon bills of exchange afterwards indorsed to him, that the bankrupt was indebted on those bills to such and such persons at the time of the act of bankruptcy, who afterwards indorsed them to the petitioning creditor. But how could such an averment be made in this case: the original cause of action, a breach of promise of marriage, was no debt at law, but only gave the party injured a right of action to recover damages, and those damages could only be recovered by judgment, and not by the verdict alone. Most of the cases cited have arisen on costs accrued in actions for debts existing before the act of bankruptcy, and which debts were themselves proveable under the commission, without any action brought

brought to recover them: ſome, indeed, have ariſen upon actions for damages only: but all of them were caſes of ſummary applications to diſcharge the bankrupt out of cuſtody on production of his certificate; and the Courts, leaning in favour of the perſonal liberty of the party whoſe whole property was taken from him by the bankrupt laws, were diſpoſed to conſider ſuch coſts as merely incidental to the debt exiſting before the act of bankruptcy, and that he being diſcharged by his certificate from the principal debt due, it was reaſonable that he ſhould alſo be diſcharged from the acceſſorial debt. But admitting that the caſes at law have eſtabliſhed, that the bankrupt taken in execution for coſts ſo incurred is entitled to be diſcharged by virtue of his certificate; it does not neceſſarily follow, that ſuch coſts would be proveable under the commiſſion, and ſtill leſs that they can found a good petitioning creditor's debt in a caſe like the preſent, where there was no pre-exiſting debt before the act of bankruptcy, but it aroſe upon a judgment obtained afterwards in an action for damages. The principal authorities againſt the bankrupt are *Longford* v. *Ellis* (*a*), *Hurſt* v. *Mead* (*b*), and *Watts* v. *Hart* (*c*), of which the ſecond was decided on the authority of the firſt, and the third on the authority of the ſecond, againſt the evident inclination of the Court of C. P. Theſe, as well as the caſe of *Lewis* v. *Piercy* (*d*), were commented upon by the Lord Chancellor in ex parte *Hill* (*e*); and to this liſt may be added another caſe at law of *Willett* v. *Pringle* (*f*), not before mentioned; where, upon a motion

(*a*) Vide *ante*, 202. note (*b*), for the ſeveral ſtatements of this caſe, and 16 *Veſ.* 256. which was now referred to.

(*b*) 5 *Term Rep.* 365. (*c*) 1 *Boſ. & Pull.* 134.

(*d*) 1 *H. Blac.* 29. (*e*) 11 *Veſ.* 646. (*f*) 2 *New Rep.* 190.

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to enter an exoneretur upon the bail-piece, which was granted, *Mansfield* C. J. seemed to doubt whether the costs could be proved under the commission; for he says that, "where a man brings an action against a bankrupt after a commission has issued, he takes the chance of losing his costs, in case the debt" (which there existed before the bankruptcy) "should be barred by the certificate." But it is to be observed, that these decisions have been made upon summary applications to the Courts of law, and have never been recognized upon principle by the Court of Chancery, which has peculiar and principal jurisdiction over matters of bankruptcy, so far as to permit such costs to be proved as a debt under the commission: on the contrary, such proof was disallowed by Lord *Henley* in the case ex parte *Todd* (*a*), which was the case of a bankruptcy intervening between a nonsuit in ejectment, and the subsequent judgment for the costs: and the like order was pronounced in *Walter* v. *Sherlock* (*b*), where the bankruptcy was between the verdict and judgment. Neither of these cases were referred to in the decisions at law (*c*). Upon the same principle Lord *Hardwicke* C. ruled a case in 1754 (*d*), and Lord *Thurlow* C. another case in 1782 (*e*). In the latter case costs taxed after a bankruptcy were not allowed to be proved as a debt under the commission, though the order

(*a*) Cited 3 *Wilf.* 270.; and by Lord *Eldon* C. in ex parte *Hill*, 11 *Vef.* 647 & 651.

(*b*) *H.* 23 *Geo.* 2. cited 3 *Wilf.* 270, 2. and by Lord *Eldon* C. in 11 *Vef.* 651.

(*c*) The Reporters of the case of *Hurst* v. *Mead*, 5 *Term Rep.* 365., referred in a note to the case *Ex parte Todd*, as appearing to bear against that decision.

(*d*) 1 *Atk.* 140. *Anon.* (*e*) *Ex parte Sneaps*, *Co. Bank. L.* 193. 5th ed.

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for taxation was made before. [Lord *Ellenborough* C. J. obferved, that there might be a diftinction taken between cofts at law and in equity: the cofts taxed at law are only an extenfion of thofe for which the verdict is taken; the fubfequent order for taxation is only for cofts de incremento, which are acceflorial to the damages found for the plaintiff at the trial. The argument, however, drawn from the decifions in equity is very material. But how is the cafe of *Longford* v. *Ellis* to be difpofed of? Whether the point there was well decided in the firft inftance is a very different queftion from that now prefented to us, whether, after that decifion has prevailed and been acted upon fo long, as the governing rule in thefe cafes, it fhall now be overturned? I am really afraid to difturb it.] This is the firft time that the queftion has arifen upon a petitioning creditor's debt. [Lord *Ellenborough* C. J. I do not know how that may be; but the principle has been univerfally acted upon in the difcharge of bankrupts from execution at the fuit of their creditors.] Thofe cafes of difcharge may ftill be acted upon in favour of bankrupts, in that form, although this fhould not be deemed a good petitioning creditor's debt.

Burrough, in reply, faid, that he had not adverted to the decifions in equity, confidering that the Court of Chancery exercifed a large difcretionary jurifdiction in matters of bankruptcy, and that the cafe had been fent here to be decided as a matter of law. He relied upon *Longford* v. *Ellis*, which had been acted upon ever fince; and infifted that there was nothing in the ftat. 5 *Geo.* 2. which required the petitioning creditor to have a de-

a demandable debt at the time of the act of bankruptcy; and before that statute it was considered (*a*), that any person might have petitioned for a commission against a bankrupt.

Lord ELLENBOROUGH C. J. observed, that in the form of the petition given in the Appendix to Mr. *Cooke's Bank. L.* it is stated, that the party became a bankrupt to defraud the petitioner of his just debt; which assumes that the debt existed before the act of bankruptcy: but that is not stated as a fact either in the affidavit of the debt, or in the commission. His Lordship then continued.—This is a case of great importance, and requires much deliberation, before we overturn a decision of above 26 years' standing, (even supposing it to have been questionable at first,) which must have been acted upon in many instances since that time, and must have operated upon property to a large amount. The general welfare of mankind requires that Courts should act upon decided authorities. I confess, therefore, that in the future consideration which I am called upon to give of this case, I shall address myself to it with great prejudice, if it may be so called, in favour of an established decision upon the point; though at the same time I must say, with great respect for the authority which sent the question here for our consideration. We will, therefore, consider most attentively the question, with all the cases bearing upon it, and send our certificate.

The following certificate was afterwards sent.

(*a*) Vide *Smith* v. *Blackham*, 1 *Ld. Ray.* 724. Sed vide *Cullen's Bank. L.* 68. note 23.

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This case has been argued before us by counsel; we have considered it, and are of opinion that the above-mentioned debt of the petitioning creditor was not a sufficient debt in law to support the said commission.

18th *June* 1811.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

Saturday, June 15th.

TEED *against* ELWORTHY.

Where a banking trade was carried on in the name of father and son, in whose joint names the accounts with the customers were headed in the banking books, the father cannot sue alone for the balance of an account over-drawn by a customer, without giving distinct proof that the son, though proved to be a minor, had no property in the banking fund, or share in the business as a partner.

THIS was an action for money lent and advanced, and for money paid by the plaintiff to the defendant's use, &c. which was brought to recover the balance of a banking account. The plaintiff had opened a banking-house in *Plymouth*, where the banking-business was carried on in the firm of *John Teed*, (the plaintiff,) *Thomas Teed*, *and Co.* The defendant kept a banking account there, in the name of the firm, for nearly two years terminating with 1809, in the course of which the balance sought to be recovered was overpaid to him. The plaintiff's clerk, upon cross-examination, proved, that the firm, in whose service he was, consisted of *John Teed*, the plaintiff, and a son of the name of *Thomas*; and that with that firm the defendant kept his account. And it further appeared, that the plaintiff had several sons from about 15 to 19 years of age, of whom *Thomas* was one; and that all their names were now introduced into the firm: but though he also said generally, that *Thomas Teed*, the son, had *no concern in the bank;* yet it did not distinctly

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appear, nor was there any particular inquiry as to the facts made at the trial, whether that son *Thomas* took any part in the business, or had any share of the profits: it was only stated at the time, that not long before he had been articled to an attorney; being then about 15 years old. Upon this evidence it was objected at the trial in *London*, before Lord *Ellenborough* C. J. that the defendant having contracted with the partnership firm of the father and son, the father could not sue alone, though the son were a minor; for there was no objection to a minor suing upon a contract made for his own benefit; or at least he might sue by guardian jointly with his father. The plaintiff, however, was permitted to take a verdict for his demand; but leave was given to the defendant's counsel to move to set it aside and to enter a nonsuit, if the Court should think the objection well founded. Accordingly,

Topping obtained a rule nisi for this purpose in the last term, and cited *Eccleston* v. *Clipsham* (*a*), and *Scott* v. *Godwin* (*b*), in which latter the rule is laid down, upon a review of all the cases, that one joint contractor cannot sue alone; and also *Smith* v. *Bowen* (*c*), *Forrester*'s case (*d*), and *Farneham* v. *Atkins* (*e*), to shew that an infant may maintain an action upon a contract when the consideration is executed: and that though an executory contract entered into by an infant may be avoided at his election, yet the adult with whom he contracted has no such election.

(*a*) 1 *Saund.* 153.; and see the cases collected by Mr. Serjt. *Williams*, in his note.

(*b*) 1 *Bos. & Pull.* 73, 5.

(*c*) 1 *Mod.* 25.

(*d*) 1 *Sid.* 41.

(*e*) *Ib.* 446.

Garrow

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Garrow and *Marryat* now endeavoured to support the verdict; and admitting that the evidence of the plaintiff's clerk, upon cross examination, went, if unexplained by the concomitant circumstances of the case, to shew that the plaintiff's infant son, *Thomas*, was a partner with him in the bank; yet they argued upon the general evidence also given, that the son had *no concern in the bank*, and the absence of all evidence that he intermeddled with or received any profit from it in any respect: they contended that the fair conclusion was, (what they stated the fact to be,) that the father merely made use of his son's name in his firm of business, as thinking it advantageous to the future prospect of his son's carrying on the business without interruption; and therefore it was no more than the plaintiff carrying on a business, of which he was the sole proprietor, in the name of a firm consisting of several: it was the father calling himself *John* and *Thomas Teed and Co.* The son had no power to dissent, if the father chose to do so. But if in fact the father alone were interested, that would not alter his legal situation with respect to third persons. The son, a minor, had no property of his own upon which he could be trading as a partner. [*Le Blanc* J. Do you not assume too much in saying, that the son had no property of his own: there was no evidence of this. Lord *Ellenborough* C. J. The son might have obtained property from other persons than his father, or by his own personal labour; and he might have advanced money to this defendant jointly with his father: then why might they not deal with it as a partnership fund? Besides the father might have chosen to let his son into a share of the business for the sake even of his personal labour; and would not that be sufficient to give the son an interest in the

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the funds of the house? His Lordship, however, upon looking over his notes again, said, that he thought it might be taken that the son had no share in the funds of the banking-house: but still he said that if the father held himself and his son out to the world as partners, and persons dealt with them as such, though the son had no share in the funds of the house, yet third persons so dealing with them would be entitled to set off, against a debt contracted with the firm, any demand upon it contracted with the son in the name of the partnership: and therefore the plaintiff should have gone further and shewn, that notwithstanding the names used in the firm of the house, there was in fact no partnership subsisting. *Le Blanc* J. The facts now relied on by the plaintiff are not sufficiently established by the evidence given at the trial: it lay upon him to shew that, though the trading firm was *John* and *Thomas Teed and Co.*, and that the defendant's debt was contracted in an account carried on in the name of that firm, yet that the son had no share, as partner, in the business with the father, and that the money advanced to the defendant was the father's money only. These facts should be further enquired into.] They then referred to two late cases of this description, in both of which the plaintiff, who traded under a firm of other names besides his own, but in truth without any partner, recovered in his own name a debt contracted by the defendant with him in the name of the firm: one was a case of *Page* v. *Hiscox*, tried at the sittings in *Middlesex* after last *Easter* term, before Lord *Ellenborough* C. J.; the other was a case tried a few years ago before Lord *Ellenborough* C J. at *Guildhall*, where *Parsons*, a stationer, who carried on his business under the name of *Parsons* and Son, recovered in his own name against

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the defendant (*Qu. Crosby*) the amount of stationary goods furnished to him. But there the son, who was an adult, was called to prove that he had no share in the business, but received wages from his father like any other journeyman. [*Le Blanc* J. In those cases the evidence negatived the existence of any partnership; but here it stopped short of that proof.]

Topping and *Beard*, contrà, referred to the cases first cited, to shew that an infant partner must be joined in suing for a partnership debt: and they relied on the fact in proof in this case, that the defendant's banking account, produced by the plaintiff in proof of the debt, was headed as an account carried on and a debt contracted with "*John Teed, Thomas Teed, and Co.:*" and that there was no evidence to disprove the partnership. They also mentioned a late case of *Gibbs* v. *Merrill*, *M.* 51 *Geo.* 3. in C. B. where the question made was, whether a contract made by an infant partner, who was not made a joint defendant with the adult partner, was void or only voidable; and it was held to be only voidable by the infant; and that the plaintiff ought to shew in what way the infant had avoided it; and not having shewn it, that the action could not be maintained against the adult partner only (*a*). The same question was again raised in another case of *Berridge* v. *Merrill*, in the same court, where a nonsuit was ordered to be entered. And they also referred to *Guidon* v. *Robson* (*b*); where the plaintiff sued in his own name as drawer and payee of a bill against the acceptor; in which the declaration stated the bill to have

(*a*) It was not stated how the question arose: Quære upon a replication to a plea in abatement.

(*b*) 2 *Campb. N. P. Cas.* 302.; et vide *Peacock* v. *Peacock*, *ib.* 45.

been

been drawn by the plaintiff in the firm of *Guidon* and *Hughes*; and it appeared that he traded under that firm, and had a clerk of the name of *Hughes*, whom he held out to the world as his partner, but whom he only employed at a fixed falary, without any participation in the profits of his bufinefs. But Lord *Ellenborough* C. J. was of opinion, that the action ought to have been brought in their joint names; and nonfuited the plaintiff.

Lord ELLENBOROUGH C. J. Suppofing the plaintiff could fue alone in this cafe, by fhewing that he alone was the proprietor of the funds of the bank, and that the fon had no intereft as a partner in this account with the defendant, although the account was kept with the defendant in the joint names of the father and fon; yet thefe facts ought to have been diftinctly proved at the trial, which they were not, and therefore the plaintiff has not entitled himfelf to recover alone in this cafe.

The reft of the Court coincided in this opinion; but in order to fave expence, they granted a new trial, upon payment of the cofts of the former trial by the plaintiff to the defendant, inftead of entering a nonfuit.

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Monday, June 17th.

ARUNDELL *against* WHITE.

In an action for maliciously arresting and imprisoning the plaintiff upon a plaint for a debt in the sheriff's court in *London*, without reasonable or probable cause, it is sufficient to allege and prove that the plaint was made "at the sheriff's court in *London*, *before* J. A., *one* of the sheriffs, &c.

The usual course of that court, upon the abandonment of a suit by the plaintiff, being to make an entry in the minute-book of "*withdrawn*" by the plaintiff's order, opposite to the entry of the plaint; held that proof of such entry in the minute-book was sufficient to prove an allegation, that the former suit was "wholly ended and determined."

And a general allegation that the plaintiff was *arrested* "under and by virtue of the plaint," is proved by shewing the plaint entered and the subsequent arrest; though it also appeared that the officer making the arrest first received a paper in the nature of a warrant, (but which was no warrant, but only the parol direction of the sheriff, which is good by the custom, reduced into writing to avoid mistake,) directing him to make the arrest; and though the stat. 12 *Geo.* 1. *c.* 29. requires a previous affidavit of the debt, which had been made in this case.

THE plaintiff declared, in an action on the case, that the defendant, maliciously and wrongfully intending to cause the plaintiff to be arrested and imprisoned on a certain plaint made by the now defendant against the plaintiff for 6000*l.*, without any reasonable or probable cause of plaint or suit to that amount against the plaintiff, &c. *at the sheriff's court in* London, *before* John Atkins, *Esq. one of the sheriffs of the said city*, on the 14th of *March* 1810, at *London*, &c. falsely and maliciously, and without any reasonable or probable cause of plaint or suit whatsoever against the plaintiff to the amount aforesaid, entered and caused to be entered a certain plaint against the plaintiff, to answer him (the defendant) in a plea of trespass on the case to his damage of 12,000*l.*; and thereupon afterwards, to wit, on the 15th of *March* 1810, at *London*, &c. falsely and maliciously, and without any reasonable or probable cause of plaint or suit whatsoever against the plaintiff to the amount of 6000*l.* aforesaid, caused and procured the plaintiff *to be arrested* by his body *under and by virtue of the said plaint, and to be thereupon* imprisoned and detained in prison for three days; when in fact the plaintiff, at the time of entering the said plaint, and at and after the said arrest and imprisonment

thereon

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thereon, was not indebted to the defendant in the said 6000*l.*, &c. And the plaintiff averred, that such proceedings were afterwards had in the same plaint or suit in the court aforesaid; that afterwards, at the court aforesaid holden at *London* aforesaid, &c. on the 16th of *March* 1810, *the said plaint was withdrawn, and is thereby wholly ended and determined.*

After a verdict for the plaintiff for 1000*l.* damages, at the trial before Lord *Ellenborough* C. J. at the sittings after *Hilary* term at *Guildhall*, *Topping* in the last term moved to enter a nonsuit, upon objections taken at the trial to the proof of certain allegations in the declaration. First, it is stated, that the plaint was made by *White* at the sheriffs' court, before *one* of the sheriffs only: whereas though in fact the one sheriff named presided in the court where the plaint was levied, yet the style of the court being "the sheriffs' court," the legal presumption is that it is held before *both* the sheriffs, who make but *one officer*: and that being the legal presumption, it is not an accurate description of the court so styled to say, that it was held before one only of the persons who then filled the office. But *Garrow*, contrà, stated the fact to be, that there are two compters where the sheriffs' courts are held; and that upon the entrance of the two sheriffs into office, they settle between themselves for which compter each shall serve, and each of them afterwards sits alone in his selected court for the greater dispatch of business (*a*). To which *Topping* answered, that this was nothing more than a private arrangement between the two sheriffs for their mutual convenience and the accommodation of the citizens, considering the extent

(*a*) Vide *Priv. Lond.* 54. 30.

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of the city, and did not alter the legal defcription of each court, which was ftill the court of both the fheriffs as one officer. *The Court* however now over-ruled this objection; Lord *Ellenborough* C. J. and *Bayley* J. obferving, that if the court might legally be holden before one fheriff, it muft be equally legal to aver the fact. And his Lordfhip further faid, that the affize courts might be ftated indifferently as being held before both the judges of affize, or before the one judge who in fact fat in court at the time (*a*).

Another objection made was to the proof of the neceffary allegation at the conclufion of the declaration, that the former plaint was "wholly ended and determined;" of which it was ftated that the only evidence given was, that a letter, figned by the defendant, "*Auguftus White*," was brought by fome perfon to the office of the court, entitled in a plaint, "*John White* v. *Arun-*

(*a*) In *Thomas Alford*'s cafe, who was tried at *Bridgewater* Summer Affizes 1776, before *Eyre* B for perjury in a caufe between *B. K.* plaintiff, and *C. C.* and others, defendants, the indictment charged that the caufe came on to be tried "at the affizes holden at *Wells* in and for the county "of *Somerfet*, on the 31ft of *July*, 9 *Geo.* 3. *before the* Honorable *Edward* "*Willes* Efq. one of his Majefty's juftices of the Court of *K. B.* &c.; "and that at the faid trial at the time and place aforefaid, before the "Honorable *Edward Willes*, one of the juftices aforefaid, *Thos. Alford* "came as a witnefs on behalf of the faid *B. K.*, and then and there, be- "fore the faid *E. W.*, did take his corporal oath, &c; he the faid *E. W.* "then and there having competent authority to adminifter an oath to "the faid *T. A.* in that behalf." It then proceeded to affign the perjury before the fame judge. Upon reading in evidence the Nifi Prius record of the former caufe, it ftated in the ufual form that the caufe was tried before the then two judges of affize, one of whom was Mr. Juftice *Willes*; (before whom the caufe was in fact tried:) on which a doubt arofe, whether the evidence maintained the indictment in that refpect; and if it did, whether one commiffioner had authority to adminifter the oath, as alleged. After conviction judgment was refpited, to take the opinion of all the Judges on thofe two queftions; and in *Hilary* term 1777, they were unanimoufly of opinion that the conviction was right. MS. Jud. S. C. 1 *Leach*, C. C. 179.

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dell and Others, directing that that suit should be withdrawn; by virtue of which the officer had made an entry in the book of the court, opposite to the entry of the plaint in question, viz. "16th *March*, withdrawn by the plaintiff's order." [Lord *Ellenborough* C. J. There was a mistake no doubt in the written order sent to the office, but the officer rectified it by applying the order to the cause to which it was meant to apply: the officer acted upon it, and the present defendant did not then repudiate the authority: then shall he now be permitted to do so?] At any rate a mere entry of "*withdrawn*" is no evidence that the plaint was ended, without some act or order of the Court thereupon. Stating, in an action on a replevin bond, that the plaint in the sheriff's court was not prosecuted by the plaintiff below, but was "*wholly abandoned*, and the suit not still depending," was held, in *Brackenbury* v. *Pell* (*a*), not to be sufficient, without shewing how the suit was determined and had ceased to depend. So in *Kirk* v. *French* (*b*), which was an action for a malicious prosecution, a judge's order in the former suit to stay proceedings, on payment of costs, and proof of such costs paid, was held by Lord *Kenyon* not to be sufficient, as not being the best evidence that the suit was at an end. *Garrow*, contrà, observed, that it was in proof at the trial, that where the plaintiff did not think proper to proceed with his plaint after it had been entered, this was the constant course in which it was put an end to, by making an entry of "withdrawn" in the minute-book of the sheriff's court. This objection also was now overruled by this Court. Lord *Ellenbo-*

(*a*) 12 *East*, 585. (*b*) 1 *Esp. N.P. Cas.* 80.

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rough C. J. ſaid, a legal termination was put to the plaint by the Court in which it originated; and that, in the only form obſerved in ſuch caſes in that Court, namely, by an entry in the minutes of the Court-book, declaring the plaint to be withdrawn.

The other, and principal objection was that the averment in the declaration, that the defendant had cauſed the plaintiff to be *arreſted under and by virtue of the ſaid plaint*, &c. was not proved by the evidence given of the practice and courſe of the Court; which was that the arreſt did not follow merely upon the plaint; but that an affidavit of the debt was firſt neceſſary, on which a warrant for the arreſt was iſſued by the ſheriff to his ſubordinate officer for that purpoſe. [Lord *Ellenborough* C. J. read from his notes the evidence, where this laſt-mentioned document was ſtated to be "a paper ſomething in the nature of a warrant, which recited the plaint levied."] It was proved that after the defendant had entered his plaint in the ſheriff's court, being then a priſoner in the King's Bench priſon, he was waited upon there by a perſon from the ſheriff's office, before whom he made the affidavit of debt, upon which the warrant, or paper in the nature of a warrant, was iſſued by the ſheriff to the officer, in conſequence of which the plaintiff was arreſted, and remained in cuſtody 24 hours before he was liberated. At all events, therefore, the arreſt was not "under and by virtue of *the plaint*," but of the ſubſequent proceeding. [Lord *Ellenborough* C. J. The plaint is the inchoate ſtep on which the other proceedings are founded. *Bayley* J. Would it be a defective ſtatement to aver that the arreſt took place "under and by virtue of the plaint *and proceedings follow-*

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ing thereupon" (*a*); or might he not aver that he caused a plaint to be entered, and under and by virtue of that plaint took such and such steps?] That would be a larger averment than the present, which is confined to the plaint alone.

Lord ELLENBOROUGH C. J. By the law, as it originally was, the party might be held to bail on the plaint: all the other proceedings are merely restrictive on the plaintiff's right, and have been subsequently introduced as matters of regulation. So the course was formerly in this court, when a defendant was held to bail, it was by virtue of the original proceeding in the action, and not upon affidavit. An officer of the court then adjusted the amount of the bail according to the nature and extent of the plaintiff's demand. It was long before affidavits of debt were introduced: they were introduced to shew with greater certainty the amount of the debt for which the party was to be held to bail. So it was in the court of the sheriff: but still the original authority to arrest and hold to bail emanates, as it seems to me, from the plaint. There is no objection, however, to looking further into this point: and thereupon the Court permitted *Topping* to take a rule to shew cause upon the last point only (*a*).

Garrow and *Comyn* now shewed cause against the rule: and as to the supposed warrant from the sheriff to the officer to make the arrest, they denied the comparison between this and the warrant issued by a sheriff to his

(*a*) Vide *Rowland* v. *Veale*, *Cowp.* 18.

(*b*) See this subject very fully discussed in *O'Mealy* v. *Newell*, 8 *East*, 364.

bailiff

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bailiff in consequence of a writ issued out of the superior courts to a sheriff to arrest a defendant (*a*): for in the sheriff's court the custom, as appears from *Privilegia Londini*, 306. 311 (*b*), is for any of the serjeants of the compter to arrest a defendant after a plaint entered, without other process, and bring him into custody until he find bail to answer the condemnation: and this is done by direction from the sheriffs ore tenus, without warrant. [*Le Blanc* J. The only question here is whether the evidence shewed that the arrest was made "under and by virtue of the plaint:" the question of the legality of such arrest is upon the record. Lord *Ellenborough* C. J. The material evidence to attend to was that there was always an affidavit of the debt before the arrest.] The custom warrants the arrest upon the plaint: the affidavit is subsequent matter of regulation. In this case it ap-

(*a*) Vide 1 *Tidd's Pract. ch.* 4. as to the execution of mesne process.

(*b*) The book cites *Mackalley*'s case, 9 *Co.* 68. and *Salmon* v. *Percivall*, *Cro. Car.* 196. In the latter case in *W. Jones*, 226. the Serjeant at Mace, to an action of trespass, justified the arrest under the plaint only, until the plaintiff found bail. The plaintiff replied that he offered sufficient security to the sheriff, and gave notice of it to the serjeant, who yet carried him to the compter. And on demurrer, the justification was held good in trespass. In *Mackalley*'s case, who was indicted for murder, in killing a serjeant at mace, making an arrest; though the indictment states that, upon the plaint levied, it was proceeded that *R. P.*, *one* of the sheriffs of the city, *by word of mouth, according to the custom* of the city, commanded the serjeant at mace to arrest the party, defendant in the plaint; yet the special verdict finds the custom to be, that after entry of the plaint in the book of the porter of the compter, as well before as after the entry of the same in the rolls of the court, for the serjeant to arrest the defendant to answer to the plaint, *without any command by word of mouth or otherwise to such serjeant at mace.* An objection was taken (p. 67.) on account of this variance; which was over-ruled; because the warrant (or rather the precept) was but a circumstance not necessary to be precisely pursued in evidence; it being sufficient that the substance of the matter stated was found. Next, it was objected, that the custom found by the jury, to arrest on the plaint, without summons, before the precept in nature of a capias issues, was bad; but that was also over-ruled.

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pears that the affidavit was taken out of the jurisdiction of the sheriff's court; the now defendant being at that time a prisoner in the King's Bench prison; the arrest therefore could only have been by virtue of the plaint.

Topping, contrà. It is no answer to the objection, that the arrest might have been good under the custom under an order from the sheriff to his officers ore tenus. It appears that an order of some kind is necessary, whether by parol or in writing; and that is the authority to the officer for making the arrest. The plaint itself is clearly no process; but process issues upon it from the sheriff: and here it appeared that a warrant or order in writing issued to arrest the defendant; and this was given in evidence by the plaintiff. He referred to *Robins* v. *Robins* (*a*), where, in an action for maliciously arresting and holding to bail, Lord *Holt* said it was necessary to state the writ specially, and shew that it was returned; and the declaration, only alleging that the defendant arrested the plaintiff by colour of certain mesne process in the law, was held not to be sufficient; and judgment was arrested. And to *Goslin* v. *Wilcock* (*b*), where the declaration, in an action for maliciously suing and arresting the plaintiff in an inferior court, sets out that, upon the plaint levied, a writ of capias ad respondendum issued, on which the plaintiff was arrested, &c. Besides, by the stat. 12 *Geo.* 1. *c.* 29., and other subsequent statutes, there can be no arrest by mesne process out of an inferior court, without an affidavit of the debt: and

(*a*) 1 *Salk.* 15. and 1 *Ld. Ray.* 503.

(*b*) 2 *Wils.* 302. This was upon a plaint levied in the borough-court of *Bridgewater*.

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here there was expreſs proof, that if there had been no other proceeding than the plaint, there could have been no arreſt: whereas the declaration ſtates nakedly, that the plaintiff was arreſted under and by virtue of the *plaint*.

Lord ELLENBOROUGH C. J. If the plaintiff had averred the arreſt to have been made by virtue of the affidavit to hold to bail, he muſt have proved it, as in *Webb* v. *Herne* (*a*), where, in an action againſt the ſheriff for an eſcape, the plaintiff averred in his declaration that he was arreſted "under a writ indorſed for bail by virtue of an affidavit on record." But in a prior caſe, which was then recollected in Lord *Mansfield*'s time, where the declaration only ſtated, generally, that a writ was ſued out indorſed for bail ſo much, it was ſaid to have been held unneceſſary to produce the affidavit (*b*). So in *Whiſkard* v. *Wilder* (*c*), the objection was taken in an action on a bail-bond, that the declaration ought to have ſet forth that the debt was ſworn to, and the ſum marked on the writ, as required by the ſtat. 12 *Geo.* 1. *c.* 29.: but the Court held it to be unneceſſary. Now what is the evidence; that there was a plaint levied, and a direction to the officer in writing, (which might have been by parol,) to prevent miſtake; which is no warrant, but ſomething, it is ſaid, in nature of a warrant; which recites the plaint levied, in order to inform the officer what the demand is. The direction being in writing does not give it more effect than if it were by parol as the cuſtom warrants. There muſt be ſome notification to the officer what he is to do. I underſtand then by the allega-

(*a*) 1 *Boſ.* & *Pull.* 281.

(*b*) *Croke* v. *Dowling*, *E.* 22 *Geo.* 3. *Bull. N. P.* 14. (*c*) 1 *Burr.* 330.

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tion, that the plaintiff was arrested *under and by virtue of the plaint*, that he was arrested in the regular prosecution of the plaint. The plaint cannot execute itself; but it is executed by the instrumentality of the officer to whom the direction is given. Two things only were necessary to be proved; the existence of the plaint, and the subsequent arrest. The paper purporting to be a warrant, (but which was no warrant,) was delivered to the officer as a memorandum to guide him in making the arrest, to prevent mistake: it was no more than a parol direction, according to the custom, put down in writing: it would be bad if it were not according to the custom. Then all that the stat. 12 *Geo.* 1. requires, as to the affidavit, is restrictive of the plaintiff's right to arrest by virtue of the plaint: it does not give the power of arrest; that power emanates from the plaint; and the statute only restrains the exercise of it till the affidavit is made. Long antecedent to the statute the arrest was made upon the plaint levied, before any affidavit.

GROSE J. "Under and by virtue of the plaint" means no more than that the plaintiff was arrested in prosecution of the plaint; and that was sustained by the evidence.

LE BLANC J. It was not necessary to state all the proceedings under the plaint. The plaint in the sheriff's court answers the purpose of the writ to the sheriff in the superior courts; and it would not be necessary in the case of an arrest, under a writ in the superior courts, to allege the warrant issued by the sheriff to his bailiff in consequence of the writ. The warrant is no process, but merely an order from the sheriff to his inferior officer to make the arrest; and it would be sufficient to

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allege the arreſt under the writ. So here the plaint ſtands in the place of the writ, and the ſheriff directs the arreſt under and by virtue of the plaint.

BAYLEY J. The plaintiff was in ſubſtance arreſted under and by virtue of the *plaint*.

Rule diſcharged.

Monday, June 17th.

TINKLER and Another *againſt* WALPOLE.

Proof of the execution of a bill of ſale of a ſhip to the defendant is not evidence to charge him as an owner with ſtores furniſhed to the ſhip, without ſhewing his aſſent to ſuch ſale. Neither is the regiſter of the ſhip, naming him as a part-owner, made by and upon the oaths of others, primâ facie evidence to charge him as owner, without his aſſent or adoption.

THE plaintiffs having on the 7th of *March* 1807 furniſhed a quantity of gunpowder for the uſe of the *Walpole* (*a*) *Eaſt Indiaman* by order of *Clarke* the ſhip's huſband and managing owner, given to them in *October* 1806, brought this action for goods ſold and delivered againſt the defendant, as one of the owners of that ſhip, to recover the value of the gunpowder; and at the trial before Lord *Ellenborough* C. J. at *Guildhall*, in order to prove the ownerſhip of the defendant, the plaintiffs firſt produced and proved the execution of two bills of ſale from the aſſignees of *Anderſon* a bankrupt to the defendant, of ſix-16ths ſhares of the ſhip; but not being able to prove that theſe ſales were made with the aſſent of the defendant, or that he had accepted, or in any manner acted upon them, his Lordſhip thought the evidence inſufficient to fix the defendant. The plaintiffs then called an officer from the Regiſtrar's office, who produced and proved two regiſters of the ſhip *Walpole*, one dated the 21ſt of *January* 1805, the other on the 7th of *March*

(*a*) The ſhip had been named the *Walpole*, from a prior owner of that name, before the defendant had any concern with her.

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1807. These registers appeared on the face of them to have been made on the oaths of *Clarke* and two other part-owners, swearing that they and others named, *including the defendant*, were owners of the ship; and the plaintiffs also produced the original certificate of registry obtained thereupon, dated 7th of *March* 1811. And these were insisted, from their authenticity as public documents required for public purposes, and obtained under the sanction of an oath, to be at least primâ facie evidence to prove the defendant a part-owner. To this was opposed the authority of the late case of *Frazer* v. *Hopkins* (a) decided in C. B. that such registers were not in themselves evidence to fix the parties therein named as owners, in actions against them, without shewing that they were made with their assent or recognized by them; and upon the authority of that case the plaintiffs were nonsuited. The Court was moved in the last term to set aside the nonsuit and grant a new trial, for the purpose of having that case re-considered, and upon the alleged practice which had prevailed of receiving such registers as evidence primâ facie against the owners of the ship therein named; and a rule nisi was then granted, against which

The Attorney-General, *Garrow*, and *Marryat* now shewed cause, and contended that the register acts, which were passed for another purpose, did not affect this question. If a deed were entered into by other parties, to which the defendant was no party, stating that he was a part-owner of the ship, it could not be pretended that it would be evidence against the defendant of that fact: how then can an entry made in the custom-house registers by third persons be evidence against him, without shew-

(a) 2 *Taunt.* 5.

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ing his consent to it? No authority can be shewn for binding one man, through the agency or act of another, without proving him to be agent, or shewing that the other had an original authority to do the act, or a subsequent recognition by the party to be bound. It amounts in effect to no more than that certain part-owners of the ship *said* that the defendant was also a part-owner with them. This is different from the act of an officer of the court, (the return of a rescue by the sheriff had been mentioned (*a*),) to which the Court will give credence, at least in the first instance; for that is in the nature of a presentment of a breach of the peace, returned ex officio by the sheriff as the reason for his not having executed the process of the Court; and he is liable to answer over for the truth of such return. A practice has certainly crept in of admitting the ship's register in proof of the ownership, without objection, on account of the general convenience of the thing: but here the client having insisted on taking the objection, the validity of such evidence must be decided upon legal principles. [Lord *Ellenborough* C. J. asked the plaintiffs' counsel if they could cast damnosam hæreditatem upon a person against his consent? If the defendant had done any thing to adopt the register, it would be a different matter; but in this case he could not find any evidence of such adoption.]

Park and *Richardson*, contrà, said that this case was distinguishable from the general rule, that res inter alios acta cannot be given in evidence: here the legislature have, on grounds of general policy, directed public registers to be made

(*a*) The Court will issue an attachment in the first instance on such return. Vide *Rex* v. *Elkins*, 4 *Burr.* 2129.; and vide *Gifford* v. *Woodgate*, 11 *East*, 297.

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made to prove the ownership of *British* navigating vessels to be in *British* subjects (*a*), and that for this purpose certain acts shall be done upon oath, in every case of a transfer of property in every such ship, in order to give notice to the public, who the purchasers of the ship are. The register therefore is a public document, authenticated upon oath, and on that ground is as much entitled to credence, in the first instance at least, as any other public document whatever directed to be enrolled or registered for public purposes: and the practice has always been, since such registers were established, to receive them as primâ facie evidence of the ownership in the vessel. This was exemplified in *Stokes* v. *Carne and Others* (*b*). In *Camden* v. *Anderson* (*c*) the objection was taken and prevailed in an action on a freight policy, that the plaintiffs, three in number, could not sue as owners; it appearing by the register produced by the defendant that two only of the plaintiffs were registered owners. [*Le Blanc* J. Does not that case differ from the present; for there the title of the plaintiffs to sue rested upon their ownership; and the production of a register, shewing the title to be in two of them only, threw upon them the burthen of proving a subsequent title in all the three. They had neglected to register the subsequent transfer, as they ought to have done. *Bayley* J. The register produced negatived the joint ownership of all the plaintiffs.] It cannot make any difference: if the register be evidence against the ship-owners when suing as plaintiffs, it must also be evidence against them when sued as defendants, in order to prove the ownership. This is more than the bare assertion of a fact by one per-

(*a*) *Heath* v. *Hubbard*, 4 *East*, 110.; and *Bloxam* v. *Hubbard*, 5 *East*, 407. were referred to.

(*b*) 2 *Campb. N. P. Cas.* 339. (*c*) 5 *Term Rep.* 709.

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son to charge another: it is an assertion of the fact upon oath, under a competent authority; and no person shall be presumed to be perjured: it is an oath, too, taken in the discharge of a public duty. The only proof at first offered in the case of *Frazer* v. *Hopkins* (*a*) was the entry in the register-book in *London*, which had been made by the officer of that port from a certificate by the officer at *Harwich*, that the property in the vessel had been transferred, together with a letter signed by the comptroller and collector of the customs at *Harwich*: and that evidence being rejected, the *Harwich* officer was called to prove the original entry of the transfer inserted in his book; which entry, as directed to be made by *s.* 15 & 16. of stat. 34 *G.* 3. *c.* 68., being no more than an abstract of the assignment indorsed on the certificate of registry, was also rejected. But even if the original indorsement on the certificate had been proved; that being the act of the seller would not have been evidence to affect the defendant who was the purchaser, without his assent; for no affidavit is required for that purpose. [*Bayley* J. As far as the notoriety of the ownership is concerned, it is the same thing.] But the evidence rejected in that case had not the same sanction of an oath as is required for the certificate of registry. It was said by *Mansfield* C. J. in the late case, that "in all cases of inrolments, the deed itself, and not the inrolment, is evidence:" but that does not agree with the case of *Smartle* v. *Williams*(*b*); though the report of it in *Levinz* shews that the acknowledgment was by the bargain*or* and not by the bargain*ee*, as stated in *Salkeld*. [*Bayley* J. The deed there was above 30 years old.] The reports do not put the admission of

(*a*) 2 *Taunt.* 5.

(*b*) 1 *Salk* 280., and 3 *Lev.* 387. But see *Bull. N. P.* 255, 6. commenting upon this case.

it on that ground. It muft be very difficult without this kind of evidence to fhew who are the owners of a fhip, unlefs by filing a bill in equity. [*Le Blanc* J. It will be done in the fame way as before the regiftry acts.]

Lord ELLENBOROUGH C. J. Notwithftanding the practice may have prevailed for a long time to receive fhips' regifters as evidence, without more, of the property being in the perfons therein named; yet when we are brought to confider the admiffibility of fuch evidence againft the defendant, in a cafe where he has done no act to adopt the regifter, as having been made by his authority; we cannot give effect to it, without faying that a party may have a burthenfome charge thereon upon him by the act of a third perfon, without his own affent or privity. If it had appeared that the defendant had by any act of his own recognized the regifter, he would have been liable to all the confequences as a part-owner, which it defcribes him to be: but here he has done no act to adopt it. His partner *Clarke* has indeed dealt with the property as if the defendant were a part-owner, by regiftering the fhip in his name; but the act of a third perfon, without fome act of the defendant to recognize it, cannot throw upon him a burthen, without violating the plain rule of law. The cafe of inrolments ftands upon a particular ftatute: the ftat. 10 *Ann. c.* 18. *f.* 3. provides that copies of the inrolment of indentures of bargain and fale, examined with the inrolment, and figned by the proper officer, and proved upon oath, fhall have the fame force and effect as the original indentures. But the regifter acts have not attributed to the regifters the fame effect as if the perfons therein named were proved to be owners. Therefore, referving my opinion in what

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refpects fuch regifters may be evidence; whether available for certain public purpofes which the legiflature had in view in requiring fuch regifters; or what conclufions may be drawn from them, if adopted by the parties therein named; I cannot fay in this cafe, that, without any evidence of fuch adoption by the defendant, he can be charged as owner, upon the mere proof of the regifter naming him as fuch.

GROSE J. It would be againft every principle we have ever read or heard of, to fay that one perfon fhall be fixed with a burthen by the act of another, without his being fhewn to be privy to that act: and authorities fhould be cited as ftrong as poffible to induce us to adopt fuch a rule in this cafe, becaufe the principle of it is unjuft.

LE BLANC J. Thefe regifters were not produced in evidence for any public purpofe within the view of the regiftry acts, but between private perfons and for private purpofes: and what is now contended is that thofe acts having required thefe regifters to be made for certain purpofes, they fhall be received as evidence for every purpofe: but I cannot adopt the argument to that extent. For every purpofe that the ftatutes have required thefe public documents to be made, they are evidence by force of the ftatutes; but when produced for any other purpofe, they are ftripped of legiflative authority and muft be evidence, or not, according to the general principles of evidence. In this cafe therefore, the regifters, having been made by third perfons, cannot be evidence againft the defendant, without proof of their having been acknowledged by him.

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BAYLEY J. Before the firft regifter act paffed, there muft have been other media of proof to charge a party as owner of a fhip; and the object of it was not to create evidence to charge any perfon named as owner, but that no perfon fhould have the benefit of the *Britifh* navigation without regiftering his fhip in the manner prefcribed. It would be very unjuft in many cafes if a perfon could be charged as a part-owner with the expences of the fhip, by having his name inferted in the regifter without his knowledge: it would often be converted into an engine of fraud: for if the owners were not in good circumftances, it would be eafy to introduce another name of a folvent man into the regifter, in order to procure credit: and then if that were evidence againft him, he would be liable to be fued: and how could he be prepared to negative the evidence if he knew nothing of the fact of fuch a regifter: the other owners named would be made parties to the action, fo that he could not call them to difprove the fact. This is very different from the cafe of a perfon publicly afferting that he is owner, by the act of regiftering a veffel in his own name: that may be primâ facie evidence for him that he is owner; becaufe he thereby publicly challenges all perfons that he is fo: but that is very different from the cafe where one is to be fued as owner upon fuch evidence made behind his back, and which he has not adopted.

Rule difcharged.

Monday, June 7th.

PLEASANT, Leſſee of HAYTON, *againſt* BENSON.

Where tenant from year to year underlet part of the premiſes, and then gave up to his landlord the part remaining in his own poſſeſſion, without either receiving a regular notice to quit the whole, or giving notice to quit to his ſub-leſſee, or even ſurrendering that part in the name of the whole (ſuppoſing that any thing ſhort of a regular notice to quit from the landlord to his immediate tenant would after ſuch ſub-letting have determined the tenancy in the whole;) yet the landlord cannot entitle himſelf to recover againſt the ſub-leſſee, (there being no privity of contract between them,) upon giving half a year's notice to quit in his own name, and not in the name of the firſt leſſee; for as to the part ſo underlet the original tenancy then continued undetermined.

THIS was an ejectment for a cottage and a ſmall plot of ground annexed, which was tried before *Groſe* J. at the laſt aſſizes at *Ayleſbury*; and the ſhort ſtatement of the facts was that one *Wilkes* held the farm, on which the cottage ſtood, under Mr. *Hayton*, as tenant from year to year from *Michaelmas* 1801, at the rent of 80*l.* a-year; and while he was ſuch tenant, he underlet the cottage and plot in queſtion to the defendant for two guineas a-year. *Wilkes*, without receiving any regular notice to quit from his landlord, agreed to give him up the poſſeſſion at *Michaelmas* 1810, and Mr. *Hayton* then took poſſeſſion of all that *Wilkes* had continued to occupy: but the defendant having before refuſed to deliver up the premiſes in queſtion, which he occupied as under-tenant to *Wilkes*, was ſerved in the *February* preceding with half a-year's notice to quit at *Michaelmas* 1810 *from Mr.* Hayton, to whom he had never paid rent or otherwiſe acknowledged as his immediate landlord, but had paid his rent to *Wilkes* up to *Michaelmas* 1808, and had tendered him the rent which had accrued ſince that time, which *Wilkes* had refuſed to receive. And the only queſtion was, whether the notice to quit given by Mr. *Hayton*, the landlord, was ſufficient to found this ejectment; he not having given any regular notice to quit to *Wilkes*, his immediate tenant from year to year; and *Wilkes* not having given any ſuch notice to the defendant. A verdict was taken for the plaintiff, with liberty to the defendant to move to ſet it aſide and enter a nonſuit.

This

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PLEASANT, Lessee of HAYTON, against BENSON.

This was moved by *Peckwell* Serjt. in the last term, on the ground that the relation of landlord and tenant never subsisted between *Hayton* and *Benson*, so as to enable *Hayton* to put an end to *Benson*'s tenancy by giving him a notice to quit; but only between *Hayton* and *Wilkes*, and between *Wilkes* and *Benson*. And though it would have been competent to *Hayton* to determine *Wilkes*'s tenancy for the whole, by giving him a regular notice to quit the whole, including what had been underlet to *Benson*; yet after *Wilkes* had so underlet a part, it was not competent for him, by agreement with his landlord, without a legal notice to quit, to determine the legal tenancy of his under-lessee in that part. The original lessee could only surrrender, by his own voluntary act, that interest which he had in him at the time; but before his surrender, he had parted with his legal interest in the part underlet to *Benson*, whose interest then could only be determined either directly, by a notice to quit at the end of his year from *Wilkes*, or incidentally, by a regular notice to quit from the landlord to *Wilkes*; *Benson* having done no act to acknowledge holding under the original landlord. He cited 4 *Bac. Abr.* 127, 8. *tit. Leases*, (I) 3., and *Roe* v. *Wiggs* (*a*), to shew that there is no privity of contract between the landlord and sub-tenant, and that the one cannot give notice to quit to the other.

Sellon Serjt. and *Hulton*, in support of the verdict, now contended, that inasmuch as the landlord, upon giving regular notice to quit to his immediate lessee, would have been entitled to possession of the whole, and upon recovery in ejectment against such lessee, the sheriff would

(*a*) 2 *New Rep.* 330. See also *Co. Lit.* 272. *b.* 273. 296.

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have turned the sub-lessee out of possession; so it was competent to the original lessee to wave notice from the landlord and agree to the surrender of his term, so as to entitle the landlord to recover in ejectment against the under-tenant, who can have no title to the possession after the determination, by whatever means, of the original term out of which his interest was carved. Great inconvenience and injustice must otherwise ensue: a landlord may know nothing of any under-tenant, and may forbear to give his immediate tenant notice to quit, by the agreement of the latter to quit without notice: but according to the rule now insisted upon, that agreement would be frustrated by a third person, no party to the original contract. [Lord *Ellenborough* C. J. In order to raise your point you should have shewn, that *Wilkes* agreed to give up the whole of what he rented to his landlord; and then the question would have been whether, as *Wilkes* had an interest from year to year in the whole, and while he had that interest in him, he had assigned part to the defendant, thereby giving him the same legal interest in that part which *Wilkes* himself had at the time, he could afterwards agree to the surrender of that part, without receiving a legal notice to quit. *Le Blanc* J. If the landlord had given his original tenant notice to quit the whole, no doubt that would have been sufficient: or if the original tenant had given his landlord regular notice that he meant to quit the whole, there might have been a question: but here it seems that the original tenant only gave his landlord possession of the part which he actually held, without any notice to quit the whole.] The defendant had the regular half-year's notice, but it was given him in the name of the landlord, and not of the first lessee, from whom he immediately held. [Lord *Ellenborough* C. J.

You

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You must stand, if at all, upon the surrender of the original tenant.] *Wilkes* has never received rent of *Benson*, since he agreed to surrender the premises to his landlord, but considered himself as having quitted his interest in the whole from that time. [*Bayley* J. *Wilkes* having created a legal interest in *Benson* in part of the premises demised to him; how can he afterwards destroy that interest by his own act without the assent of *Benson*. Suppose tenant for years granted a rent-charge upon his whole term, could his subsequent surrender of the term destroy the rent-charge?] There the assignee must take subject to the charge: but here *Wilkes* had no certain interest, but only an interest determinable at the pleasure of the landlord upon giving a certain notice: then the party for whose benefit the notice was required may wave it. [*Le Blanc* J. *Wilkes* had as great an interest to assign as he had himself in the premises at the time, and that was an interest as tenant from year to year, determinable only upon a due notice to quit.] *Benson* was either in the relation of tenant of the premises or a trespasser: as a trespasser, he was not entitled to notice; and as tenant he received a regular notice from the landlord.

Lord ELLENBOROUGH C. J. The defendant is neither a tenant to *Hayton*, nor a trespasser; but he holds under *Wilkes*, the original tenant, his unextinguished tenancy in this part. A tenancy from year to year is determinable either by a regular notice to quit; or, I might say for the purpose of this case, by a surrender of a part of the premises in the name of the whole: but *Wilkes* has not done even that; for he merely ceased to reside on the part which he had retained in his own possession, without

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making a surrender in the name of the whole. But while he was tenant from year to year of the whole, he let off a part to the defendant; and nothing has been done to put an end to the tenancy as to that part.

GROSE J., who had tried the cause, gave no opinion.

LE BLANC J. This was not considered as a surrender of the whole by *Wilkes*; for if he had been asked whether he meant to make himself liable to *Benson*, to whom he had underlet a part, by his surrender of the whole premises, he would probably have revolted from any such admission. The mistake has been, that the landlord neither gave notice to quit to *Wilkes*, nor to the defendant in the name of *Wilkes*.

BAYLEY J. *Hayton* made *Wilkes* tenant from year to year, by which *Wilkes* acquired a legal interest in the premises, not determinable by *Hayton* except upon giving him six months' notice to quit. But so long as that term continued, the lessee had a right to act on it, and to grant to third persons the interest which he himself had in it. And I take it that the surrender of the lessee would not destroy any interest which a stranger claiming under him had acquired in the term in the mean time. As in *Co. Lit.* 338. *b.* it is said, speaking of the surrender of tenant for life, "that having regard to the parties to the surrender, the estate is absolutely drowned, &c.: but having regard to strangers, who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath

hath in consideration of law a continuance." And the case is afterwards put, if tenant for life grant a rent-charge, and after surrender; yet the rent remaineth; for to that purpose he cometh in under the charge." Therefore, though the estate may be effectually destroyed by the surrender, as between the surrenderor and surrenderee; yet it continues as to strangers who in the intermediate time have acquired an interest in it. So here, while the tenancy from year to year subsisted between *Wilkes* and *Hayton*, *Wilkes* had a legal interest in the land, determinable only upon a regular notice to quit: then the sub-lease of a part by *Wilkes* to *Benson* is an agreement that *Benson* shall have that part pending that interest; and therefore without a regular notice to quit from *Hayton* to *Wilkes*, or from *Wilkes* to *Benson*, that interest will continue in the part so underlet.

Rule absolute.

NEWMARCH and TEALBY *against* CLAY and WM. and THOS. LUMB.

Tuesday, June 18th.

Where the plaintiffs had dealt for a long time with two partners, not knowing that they had a third partner during part of the time, and furnished them with goods, and received payments on account generally, and previous to the time when the secret tri-partnership was dissolved, goods had been furnished, to cover which bills had been paid to the plaintiffs by the two ostensible partners, which were dishonoured after the secret dissolution of the tri-partnership, and then other goods were furnished as before; yet as the dishonoured bills were afterwards delivered up by the plaintiffs upon the receipt of the subsequent good bills, which latter were more than sufficient to cover the debts of the tri-partnership, though not to cover, in addition, the goods furnished after the dissolution of it; held that such delivering up of the old dishonoured bills, upon receipt of the new good bills, was evidence of a particular appropriation of such new bills in payment and discharge of the old debt; of which the secret third partner might avail himself in an action on the case for goods sold and delivered, brought against him jointly with the other two partners.

But as the other two partners had suffered judgment to go by default, the plaintiffs could not be nonsuited, but the third partner, who defended, was entitled to a verdict.

THIS was an action upon the case for goods sold and delivered; to which *Clay* pleaded the general issue, and the other two defendants suffered judgment by de-

fault,

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fault. At the trial before *Thomson* B. at *York*, it appeared that the plaintiffs were timber merchants at *Hull*, and dealt with the defendants, who were partners in trade at *Leeds*, in the manner after stated. That *Clay* by deed, dated the 14th of *July* 1805, entered into partnership for 8 years with the two *Lumbs*; but the business was ostensibly carried on in the names of *William* and *Thomas Lumb*, and *Clay* was not then known to be a partner; and it was not disputed that this secret partnership was dissolved by consent on the 1st of *December* 1808, after which the business continued to be carried on by the two *Lumbs* only. But a notice of the dissolution of the partnership, dated 13th *September* 1809, was read from the Gazette of the 11th of *November* 1809. During the period mentioned in the following account, which was produced at the trial, the plaintiffs had no knowledge of *Clay* being a partner with the *Lumbs*. The goods were furnished at a credit of six months on bills. The account was thus exhibited:

" Drs.

" Messrs. *Wm.* and *Thos. Lumb*, *Leeds*, in account with *Newmarch* and *Tealby*.

1807.				
Nov. 25.	To goods at 6 months' credit, due 25th *May* -	£122	14	0
1808.				
March 4.	To goods at do., due 4th *Sept.*	52	14	0
May 28.	To goods at do., due 28th *Nov.*	54	4	0
Oct. 28.	To goods at do., due 28th *April* 1809 - -	32	7	10
1809.				
May 26.	To goods at do., due 26th *Nov.*	52	12	0

July

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July 10.	To bill returned and charges -	66	4	6
24.	To goods at do., due 24th *Jan.*	125	10	0
Sept. 28.	To bill returned and charges -	101	17	3
Oct. 30.	To goods at 3 months' credit, due 30th *Jan.* - -	66	3	0
Dec. 6.	To goods at 6 months, due 6th *June* 1810 - -	122	14	0
		£797	0	7
	To balance brought up	360	19	7

Crs.

1808.				
May 20.	By bill - -	£80	0	0
Sept. 21.	By bill - - -	50	0	0
1809.	[£.130.]			
March. 25.	By bill [These bills were not paid when due.]	65	0	0
Jan. 14.	By bill	100	0	0
Dec. 1.	By bills - - -	141	1	0
	Balance carried up	360	19	7
		£797	0	7

The payments contained on the credit side of this account were all made without any express appropriation at the time; and even when the last bills for 141*l.* 1*s.* were received, there was *no specific agreement* that that sum was to be applied in part discharge of the dishonored and returned bills of 65*l.* and 100*l.*; *but these latter were in fact delivered up at the time.* Upon reference to the state of the account, it appears that the amount of goods delivered up to the 28th of *October* 1808 inclusive, before the dissolution of the partnership on the 1st of *December* 1808, was 261*l.* 19*s.* 10*d.*; and that the payments up to that time were 130*l.*; and if the last item of credit for

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for 141*l.* 1*s.*, which was paid the 1st of *December* 1809, (after the dissolution of the partnership,) when the two dishonored bills of 65*l.* and 100*l.* were taken up, was to be added to the other sum of 130*l.*, and applied in discharge of the 261*l.* 19*s.* 10*d.*, the plaintiffs would be overpaid by the tri-partnership to the amount of 9*l.* 1*s.* 2*d.* But if the 141*l.* 1*s.* ought to be considered as applicable by the plaintiffs to the discharge of the 52*l.* 12*s.* the amount of the next delivery of goods on the 26th of *May* 1809, (the payment of which became due on the 26th of *November* following,) as well as to the 261*l.* 19*s.* 10*d.* due at the dissolution of the tri-partnership, (which application the learned judge was of opinion that the plaintiffs had a right to make; considering that no express directions had been given at the time of payment by the *Lumbs*, as to what particular account it should be applied in payment of;) then there would be due to the plaintiffs 43*l.* 10*s.* 10*d.* (*a*); for which sum the jury were directed to find their verdict; reserving leave to the defendants to move to set it aside (*b*).

A rule nisi was accordingly obtained by *Topping* in the last term for this purpose, and opposed by *Park* in this. The general rule was not disputed, that if the debtor, who owes money on several accounts, do not apply a

(*a*) Goods delivered to the 28th of *October* 1808 - - - £261 19 10
Do. 26th of *May* 1809, due 26th of *November* 1809 - - - 52 12 0

	£	s.	d.
Goods delivered to the 28th of *October* 1808	261	19	10
Do. 26th of *May* 1809, due 26th of *November* 1809	52	12	0
	314	11	10
Payments to 1st *December* 1809	271	1	0
	£43	10	10

(*b*) By inadvertence, the leave was given to move to enter a nonsuit, which could not be where some of the defendants in a joint contract had suffered judgment by default; although the action was laid in case.

part

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part payment when made to a particular debt, but pay in the money generally, the creditor has a right to apply it to any part of his demand which he pleafes; and feveral cafes (*a*) were referred to on moving the rule in this cafe, and alfo in another fimilar cafe of *Slater* v. *Howard* in the fame term, which had been tried at the fame affizes and before the fame judge, but which was afterwards compromifed. But it was contended that thefe cafes might be diftinguifhable from the general rule, confidering it as applicable only to cafes where the debtors and creditors continued the fame at the feveral times of the debts contracted and payments made; whereas this was the cafe of an unknown partner, whofe interefts were to be affected by the application of this rule, by the creditors applying payments made by his acting partners, which were more than fufficient to cover all the debts contracted during his intereft in the concern, to debts contracted by them fubfequent to the diffolution of the partnerfhip. And it was alfo urged, that there was evidence of an implied though not of an exprefs appropriation; inafmuch as, at the time of the payment of the 141*l.* 1*s.* in bills, on the 1ft of *December* 1809, the former difhonored bills of 65*l.* and 100*l.* were taken up; which payment of 141*l.* 1*s.* was more than fufficient to cover all former debits.

(*a*) Thefe cafes are collected in *Peake's Law of Evidence*, 251. &c. they are *Anon Cro. Eliz.* 68. *Goddard* v. *Cox*, 2 *Stra.* 1194. *Meggott* v. *Mills*, 1 *Ld. Ray.* 286. *Dowe* v *Holdfworth*, *Peake's N. P. Caf* 64.; and *Hammerfley* v. *Knowlys*, 2 *Efp. N. P. Caf* 66. And I have a note of another cafe of *Hall* v. *Wood et Uxor*, tried at the fittings at *Weftminfter*, *Hil.* 1785, where Lord *Mansfield* C. J. alfo laid down the rule, that payment may be applied by a creditor to any part of a debt, where he has feveral forts due to him from the party making the payment; unlefs it be particularly fpecified at the time to which part it is to be applied.

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After a particular confideration of the account by the Court,

Lord ELLENBOROUGH C. J. faid, that there might be a fpecial application of a payment made, arifing out of the nature of the tranfaction, though not expreffed at the time in terms by the party making it: and here the payment of the bills for 141*l.* 1*s.* was evidenced by the conduct of the parties to have been made for the purpofe of taking up the antecedently difhonoured bills, in the difcharge of which the defendant *Clay* was interefted; for, upon receiving this payment, the difhonored bills were delivered up.

The reft of the Court agreed in this view of the cafe: and thereupon they faid that it would be better for the plaintiffs themfelves, inftead of having a new trial, to enter a verdict for the defendant, as there could be no nonfuit entered, according to the liberty referved at the trial, becaufe two of the defendants had fuffered judgment by default. And this it was agreed fhould be done, unlefs in the courfe of the term the plaintiff's counfel fignified their defire to have a new trial, upon fhewing any probable ground for varying this ftatement of facts upon another trial. But no further notice was taken of the cafe in court.

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DOE, Lessee of RODD, *against* ARCHER.

Friday, June 21st.

Where a farm was leased for 21 years, at a rent of 180*l.* per ann. consisting, as described in the lease, of *the Town Barton*, and its several parcels described by name, at the rent of 83*l.*, other closes named, at other rents of 5*l.*, 5*l.*, and 1*l.*; the *Shippen Barton*, and its several parcels described by name, at 86*l.*: with a power reserved to either party to determine the lease at the end of 14 years, on giving two years' previous notice: held that a notice by the landlord to his tenant to quit "*Town Barton*, &c. *agreeably to the terms of the covenant* between us on the expiration of the 14th year of your term," given in due time, was sufficient. A notice to quit a part only of premises leased together is bad.

THE lessor, by indenture of lease dated 10th of *February*, 37th *Geo.* 3. 1796, (by mistake for 1797,) demised to the defendant "all those parts and parcels of "the *Barton* or farm called *Town Barton*, that is to say, "the mansion-house, out-buildings, &c., the pound-"house, orchard, &c., (enumerating some other par-"cels,) containing together 9 acres and a half; also all "those several overlands, &c. (enumerating many more "closes, containing 36, and others containing 50 "acres); and also all those parts and parcels of the "*Barton* called *Shippen Barton*, that is to say, broad-"meadow, &c. (enumerating other closes,) containing "together 54 acres," in the parish of *Doddiscombe Leigh*, in the county of *Devon*; to hold the same *from the 29th of* September *then last past* for 21 years; (subject to a proviso giving liberty to either party to determine the lease at 14 years, on giving to the other party at least two years previous notice of such intention;) "yielding and "paying yearly during the said term the annual rent of "180*l.*, that is to say, for the parts and parcels of *Town* "*Barton* (and certain closes mentioned) 83*l.* (For cer-"tain other closes by name 5*l.*, and 5*l*, and 1*l.*,) and "for the parts and parcels of *Shippen Barton* 86*l.*, upon "the four most usual feasts, &c. by even quarterly pay-"ments during the said term; the first payment thereof "to be made on the 25th of *December* next ensuing the "date hereof." The lease was in fact executed on the 10th of *February* 1797: but before the true date was adverted to, and upon the supposition of the lease hav-

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Doe, Lessee of Rodd, against Archer.

ing been executed in *February* 1796, a notice to quit was given by the lessor to the defendant on the 29th of *September* 1807, requiring him, "*agreeably to the terms of the covenant* between *us*, to deliver up *Town Barton* at the end of the 14 years term for which you stand tenant for the same." After the error was perceived, a second notice to quit was given on the 16th of *September* 1808: "Mr. *S. Archer*, agreeable to the terms of the covenant between us, I hereby give you due notice to deliver up possession of *Town Barton*, &c. on the expiration of the 14th year of your term." Signed by the lessor. The tenant not having quitted the demised premises pursuant to these notices, this ejectment was brought by the landlord to recover back the possession of them; the demise being laid on the 1st of *October* 1810. And at the trial before *Chambre* J., at *Exeter*, the question arose on the sufficiency of the notices; the first of which was objected to, as applying only to the *Town Barton*, which composed only a small part of the demised premises; and the second, wherein the *&c.* was added, as being in effect the same, and giving no distinct information that any, or, if any, what other parts of the farm were required to be given up: and it was urged, and not denied, that it was not competent to the lessor to determine the lease partially. Upon this objection, aided by the further consideration, that the lease reserved a distinct rent for *the Town Barton*, with the addition of the lands called over-lands, and other distinct rents for other parts of the premises; and in particular, as there was another *Barton*, the *Shippen Barton*, named, forming the most considerable division of the farm, and for which a larger rent was reserved than for *Town Barton* and its several parcels; the learned Judge thought the notices

to

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to quit *Town Barton*, without naming the other *Barton* or any thing else, were defective, and not helped by the introduction of an "*&c.*" into the latter of them, which he thought too indefinite to supply the omission; and thinking therefore that the tenant's term was not put an end to by such notices, he directed the jury to give their verdict for the defendant; which they accordingly did.

It was thereupon moved in the last term, by *Dampier* (with *Lens* Serjt.), to set aside the verdict, upon the sufficiency of the latter notice to quit, which it was said could not be misunderstood by the tenant; the *Town Barton* being the first-named and principal place on the farm, where the mansion was, and the "*&c.*" comprehending the rest: though even that "*&c.*" was not necessary; as nothing was more common than for premises let and farmed altogether to be described by the name of the mansion, or other principal place, though composed of a variety of parts and closes having distinct appellations, which were only used when it was necessary to distinguish between the several parts. But it would introduce great inconvenience to require such minute descriptions in notices to quit; especially as a failure in describing accurately any one part would nullify the notice for the whole; for it was admitted that a notice to quit a part only, under an entire letting, would be bad. [Lord *Ellenborough* C. J. said that there seemed to be some reason in the "*&c.*" in the last notice.

Courtenay (with *Pell* Serjt.) now opposed the rule, and observed that the *Town Barton* did not appear, by the lease, to be the principal part of the farm, at least in

 value,

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Doe, Lessee of Rodd, *against* Archer.

value, as the rent reserved for *Shippen Barton* and its parcels was greater than for the different parts of *Town Barton*. The two *Bartons* might formerly have been distinct farms, though now leased together; and the "&c." if available at all in a notice to quit, might more properly be taken to refer to the other parcels of the *Town Barton* named in the lease, than to a distinct *Barton* let at a greater rent.

Lord Ellenborough C. J. The landlord must have intended to give such a notice to quit as the lease reserved to him the liberty of giving, and not a void notice to quit a part only: and so the notice in question must have been understood by the tenant. The notice to quit the *Town Barton*, where the mansion was, meant the *Town Barton* cum sociis; especially with reference to the lease, which only gave him power to determine the tenancy as to the whole of what was let together.

Grose J. agreed.

Le Blanc J. There being no power under the lease to determine the tenancy as to part only, the notice to quit could have no operation at all unless taken, as it must have been intended, to apply to the whole.

Bayley J. We are to construe the notice to quit in such a way ut res magis valeat quam pereat.

Rule absolute.

CHURCHWARD *against* STUDDY.

Friday, June 21st.

The plaintiff's dogs having hunted and caught, on the defendant's land, a hare started on the land of another, the property is thereby vested in the plaintiff, who may maintain trespass against the defendant for afterwards taking away the hare. And so it would be though the hare, being quite spent, had been caught up by a labourer of the defendant *for the benefit of the hunters.*

THIS was an action of trespass for taking and carrying away a dead hare, the property of the plaintiff: to which not guilty was pleaded: and at the trial before *Chambre* J. at *Exeter*, the evidence in support of the action was that the plaintiff, a farmer, being out hunting with hounds of which he had in part the management, and actually had such management at the time, though the hounds belonged to other persons, the hounds put up a hare in a third person's ground, and followed her into a field of the defendant, where, being quite spent, she run between the legs of a labourer who was accidentally there, where one of the dogs caught her, and she was taken up alive by the labourer; from whom the defendant immediately afterwards took the hare and killed her. Shortly after the plaintiff came up and claimed to have the hare as his own; but the defendant refused to give it up; and questioned the right of the plaintiff to be where he then was. The labourer, upon his examination at the trial, swore that when he took the hare from the dogs he did not mean to take it for his own use, but in aid of the hunters. The case of *Sutton* v. *Moody* (*a*) was referred to; where it was said by *Holt* C. J., that "If *A.* start a hare in the ground of *B.*, and hunt and "kill it there; the property continues all the while in *B.*: "but if *A.* start a hare in the ground of *B.*, and hunt "it into the ground of *C.*, and kill it there; the property "is in *A.*, the hunter: but *A.* is liable to an action of

(*a*) 1 *Ld. Ray.* 250. and 2 *Salk.* 556.

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" trefpafs for hunting in the grounds as well of *B.* as of " *C.*" And the learned Judge thought that this evidence fufficiently eftablifhed the plaintiff's property in the hare; and the jury found a verdict for the plaintiff, with 40*s.* damages.

It was moved by *Lens* Serjt., in the laft term, to fet afide the verdict and enter a nonfuit, or have a new trial, upon the fuppofition that there was no evidence that the hare had been in any manner reduced into the poffeffion of the plaintiff, before it had been taken from the labourer by the defendant; and that the labourer was not to be confidered as having taken it up for either of the parties: though Lord *Ellenborough* C. J. and *Bayley* J., (the only Judges then in Court,) were of opinion that if the plaintiff's hounds had killed or caught the hare, it would have given the plaintiff a property in it when thus reduced into his poffeffion. And now, after the report of the facts, as above ftated, had been read; and *Jekyll*, in oppofing the rule, had referred to the cafe of *Sutton* v. *Moody* (*a*), confirmed in 2 *Blac. Com.* 419.

Lens Serjt. faid that he was not aware when he moved the rule, that the labourer, who was one in the employ of the defendant, had proved that he had taken up the hare in aid of the hunters, but that he had taken it up before it had been actually caught by the dogs, either for his own ufe or for the defendant, to whom, as to the owner of the land, he had immediately given it up.

Lord Ellenborough C. J. I did not underftand at the time when the rule was granted, that the plaintiff,

(*a*) 2 *Salk.* 556. and 5 *Mod.* 375.

through

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CHURCHWARD *againſt* STUDDY.

through the agency of his dogs, had reduced the hare into his poſſeſſion: that makes an end of the queſtion. Even though the labourer had firſt taken hold of it before it was actually caught by the plaintiff's dogs; yet it now appears that he took it for the benefit of the hunters; as an aſſociate of them; which is the ſame as if it had been taken by one of the dogs. If indeed he had taken it up for the defendant, before it was caught by the dogs, that would have been different; or even if he had taken it as an indifferent perſon, in the nature of a ſtakeholder.

Per Curiam, Rule diſcharged.

The KING *againſt* The Inhabitants of BIRMINGHAM.

Saturday, June 22d.

A pauper renting a houſe in the pariſh of *A*, where ſhe received occaſional relief, and having relations in *B*, an adjoining pariſh, but no ſettlement in either; after having been ſent backwards and forwards from one to the other, was at laſt taken by the pariſh officer of *A*. into *B*., by which ſhe was then relieved, and threatened to be ſent to priſon if ſhe returned again into *A*: held that her reſidence in *B*. under ſuch circumſtances did not prevent her removal from thence by an order of juſtices to her place of ſettlement.

BY an order of two juſtices, *Mary Hopkins* and her children were removed from *Feckenham*, in *Worceſterſhire*, to *Birmingham*, in *Warwickſhire*; which order was confirmed, on appeal to the ſeſſions, ſubject to the opinion of this Court on the following caſe.

The pauper, *Mary Hopkins*, was reſident in the pariſh of *Inkberrow*, in *Worceſterſhire*, and renting a houſe there, and receiving relief from that pariſh. Upon applying, as uſual, for this relief to the officers of the pariſh, it was refuſed her, and ſhe was deſired to go to the officers of *Feckenham*, an adjoining pariſh, in which ſome of her huſband's relations had reſided. This ſhe did, and was, by the officers of *Feckenham*, refuſed relief, and ſent back again to *Inkberrow*. Upon her return to *Inkberrow*, and again applying to the officers of that pariſh for relief, they refuſed relief, and deſired her

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to apply again to *Feckenham*; and when ſhe expreſſed an unwillingneſs to do ſo, one of the overſeers of *Inkberrow* took her, without any order of removal, to the pariſh officers of *Feckenham*, and told her not to return again to *Inkberrow*. Upon her being thus brought to *Feckenham*, the officers of that pariſh relieved the pauper, and at the ſame time threatened to ſend her to priſon if ſhe returned to *Inkberrow*. The pauper however was ſtill deſirous of returning to her houſe in *Inkberrow*, but was prevented from ſo doing by the threats of the pariſh officers of *Feckenham*. Under the above circumſtances ſhe remained in *Feckenham*, where ſhe had previouſly no place of abode, for 8 or 10 days; at the end of which time ſhe was removed, by an order of two magiſtrates, from *Feckenham* to *Birmingham*. The queſtion was whether the pauper, being in the pariſh of *Feckenham* under the circumſtances above-mentioned, was liable to be removed by an order of two magiſtrates to the place of her ſettlement.

Peake and *Puller* were to have argued in ſupport of the order of ſeſſions; but the Court deſired to hear what could be urged againſt it.

Clarke and *Reader*, contrà, contended that the pauper was not a proper ſubject of the laws of removal from *Feckenham*, becauſe ſhe did not go into that pariſh to ſettle or inhabit, but was compelled to be there by a ſpecies of dureſs of the pariſh officers themſelves. And they cited *Rex* v. *St. James'* in *Bury St. Edmunds* (*a*), where a poor perſon detained in a pariſh by an accident

(*a*) 10 *Eaſt*, 25.

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where he was relieved was held to be casual poor, and not removeable by an order.

Lord ELLENBOROUGH C. J. That was a very different case: but this was the case of a starving vagrant in whichever of the two parishes she was, who was going backwards and forwards between them, and would have been starved if she had not received temporary relief from one or the other. She was liable to be removed from either. How then can this oscillation between the two parishes affect the order of removal to her proper parish.

Per Curiam, Orders confirmed.

The KING *against* The Inhabitants of EGREMONT.

Saturday, June 22d.

In order to prevent the settlement of an apprentice bound to a master who was residing in the parish under a certificate from a friendly society, by virtue of the stat. 33 *Geo.* 3. *c.* 54. it is not sufficient for the certificated parish merely to produce the certificate, upon appeal to the sessions from an order of removal of the apprentice to such parish, but they must also shew that such certificate had been *delivered* to the parish officers, as mentioned in *f.* 17. of the act, before the service of the apprentice.

TWO justices, by their order, removed *William Gainford* from *Egremont* to *Cockermouth*, both in *Cumberland*; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case.

On the part of the respondents, it was proved that the pauper had been regularly bound apprentice to *John Raney*, on the 18th of *April* 1802, for 7 years, and served with him under the indentures of apprenticeship for several years in *Egremont*, and served more than 40 days of the latter part of his apprenticeship with *Joseph Borrowscall*, in *Cockermouth*, with the consent of his original master, and resided with him there for that period. On the part of the appellants, the following certificate

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from a friendly society was given in evidence, to prove that *Borrowscall* was then residing at *Cockermouth* under such certificate, and therefore that the apprentice could not gain a settlement by serving him under the indenture. "*Cockermouth, April* 29th, 1807. We, the undersigned, president and stewards of the Amicable Society, held at the *Ship*, at *Cockermouth*, in the county of *Cumberland*, acting under the sanction of the legislature, do hereby acknowledge that the bearer, *Joseph Borrowscall*, senior, is a member of the said Society. As witness our hands,

Joseph Hodgson, of *Cockermouth*, tanner, President,
Robert Quay, of ditto, hatter, - } Stewards.
Watson Hamson, of ditto, taylor, - }

Witness, *John Wallace*, of do. clerk to the Society.

And on the said certificate was an indorsem nt, signed by a justice of the peace of the county, certifying the oath of the subscribing witness taken before him, that he saw the persons whose names were subscribed severally sign the certificate; and verifying his own hand-writing to it, as such witness. And the only question was whether the production of the certificate was sufficient evidence under the stat. 33 *Geo.* 3. *c.* 54. without proof of its having been *delivered* to the churchwardens and overseers of *Cockermouth*,

Fell and *G. Lamb*, in support of the order of sessions, contended that the evidence was sufficient; for that under the statute the bare production of the certificate was sufficient. The 18th section of the act provides that every certificate in the form thereby prescribed, attested by the witness, and certified by the magistrate, as this was proved to be, "shall be taken, deemed, and allowed in all courts whatsoever as duly and fully proved, and

shall

ſhall be taken and received as evidence without other proof thereof." But if this were not ſufficient, yet the ſeſſions, under the circumſtances, might preſume that it had been delivered, as it was produced in court by the pariſh officers of *Cockermouth*, the appellant pariſh.

Lord ELLENBOROUGH C. J. To warrant them in preſuming any fact there muſt be preſumable matter. The mere *giving* of the certificate by the Society to the member is not made ſufficient by the act to protect his reſidence under it in the pariſh, without a *delivery* of it to the pariſh officers. The 17th ſection ſays that no member of the Society who ſhall come to inhabit in any pariſh, *and ſhall deliver to the churchwardens or overſeers* of the poor of ſuch pariſh a certificate, &c. ſhall be removable till actually chargeable. But if it remain in the pocket of the certificated perſon, that is not ſufficient to prevent a ſettlement being gained under him. Here there is an abſence of any proof of its having been delivered to the pariſh officers before the period when the apprentice ſerved his maſter in the pariſh of *Cockermouth*, and therefore an excluſion of any preſumption of the fact.

Per Curiam, Order of ſeſſions quaſhed.

Paley, and *Courtenay* Jun. were to have oppoſed the order.

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The truftees of a Methodift chapel, receiving money annually for the rents of the pews, are rateable for the profits made of the building, though in fact they expended the whole of what they received in making difburfements for repairs, &c. and to attendants in the chapel, and in paying the falaries of the preachers; confidering that thefe latter in effect were entitled to receive the furplus profit, after paying all neceffary expences of the chapel; and therefore that the rate was fubftantially upon them, through the medium of the truftees, who received the profits in the firft inftance.

IN a three months' affeffment made for the relief of the poor of the parifh of *St. Martin, Coneys-Street, York*, at the rate of 9*d.* per pound per month annual rent, the defendants were thus rated; "Meffrs. *Agar* and *Gibfon*—Chapel—Rent 20*l.*—one month 15*s.*—three months 2*l.* 5*s.*" Againft which affeffment they appealed, on the grounds that the Methodift chapel therein mentioned was not liable to be rated; and that they (the truftees) were not liable to be rated in refpect of it, not being the occupiers of it, nor having any beneficial or other intereft therein which was legally the fubject of a rate. The feffions, however, confirmed the rate, fubject to the opinion of the Court on thefe facts.

In 1804 the appellants purchafed a piece of ground, upon which, by means of voluntary contributions, they erected the chapel in queftion, which was duly regiftered under the toleration act in the confiftory court of the Archbifhop of *York*: and by indentures of bargain and fale of the 4th of *June* 1805, duly enrolled, the premifes were fhortly afterwards conveyed to them, upon truft, that they fhould let the pews and feats in the chapel, under fuch yearly or other payments as they might think fit, and upon other trufts as therein more particularly appear (*a*); (the deeds forming part of the cafe.)

(*a*) No reference was made in the argument to any other truft in the deed. The premifes therein conveyed were defcribed as "the new erected edifice or building intended to be ufed for a Methodift chapel or preaching-houfe, with the fmall yard in front thereof, and a fmall new erected building at the fouth-eaft corner of the faid chapel, intended to be ufed as a veftry thereto, fituate in *New ftreet*, in the city of *York*," together with certain dwelling houfes, &c. adjoining.

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The conſideration money for the purchaſe of the ground, and the ſums expended in erecting the chapel, were raiſed partly by voluntary donations, and partly by ſums borrowed by the appellants. The current expences of the truſtees in ſupporting the chapel during the year 1810, as appear by the diſburſements after mentioned, were 247*l.* 7*s.*; and the whole of the pew-rents received for that year amounted to 221*l.* 4*s.*, which were applied towards the diſcharge of the following expences; namely,

	£	s.	d.
To premium and duty for one year's inſurance of the chapel from fire, ending 25th *December* 1810 - - -	2	5	0
To a year's rent and taxes of two dwelling-houſes occupied by the two Methodiſt preachers, ending 25th *December* 1810	70	0	0
To chapel cleaners and candle ſnuffers	20	16	0
To *J. Pollard* for painting the wood-work of the chapel - - -	6	18	1
To *J. Hick* for candles uſed in the chapel during the year 1810 - -	7	17	6
To *William Smith* for blinds for the chapel windows - - -	4	0	3
To *John Cobb* for bricklayers' work done in and about the chapel for 1810 -	7	18	11
To *R. Hartley* and ſon for glaziers' work done in and about do. for 1810 -	0	11	0
To *Thomas Gibſon* and Co. for whiteſmith's work done in and about do. during 1809 and 1810 - - -	2	11	5

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To one year's quarterage for ſalary and board allowed to two Methodiſt preachers for officiating in the *York* chapel -	110	0	0
To chapel door-keepers for one year ending 25th *December* 1810 - -	2	2	0
To bruſhes for cleaning the chapel, and for turpentine and ſundries for do. -	2	9	7
To *George Prieſtly* for candles for the uſe of the auditors for 1810 - -	4	17	3
To *Thomas Stodhart* for half a year's ſalary for conducting the ſinging in the chapel, ending 25th *December* 1810 -	5	0	0
	£247	7	0

The point reſerved by the ſeſſions was whether the appellants, under the above circumſtances, were liable to contribute to the relief of the poor, in reſpect of the rents or monies ſo received for the pews, and ſo applied as above ſtated.

Park and *Richardſon*, in ſupport of the rate, ſaid; that the caſe of *Robſon* v. *Hyde* (*a*) having decided that a building leaſed as a chapel, of which profit was made by letting the pews, was rateable, left no queſtion to be diſcuſſed in this caſe, ſince it was clear that ſome profit was made of the building by theſe truſtees; (and this Court will not enquire into the quantum;) however they might think proper to appropriate it in providing dwelling-houſes and ſalaries for the preachers who officiated in it, or wages to the attendants and others employed

(*a*) *Cald.* 310.

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there. [Lord *Ellenborough* C. J. The application of the money received may be very proper; but the receipt of it by the truftees for the rent of the pews is rateable.] They faid that the only queftion made in the cafe of *St. Luke's Hofpital* (*a*), and others of the like defcription, was whether any perfon could be found who ftood in the fituation of an occupier, in contemplation of law, on whom the rate could be impofed: but it never was doubted that, if the property itfelf produced profit, and there were a legal occupier, he was rateable in refpect of it; though he did not receive the profit for his own benefit. In *The King* v. *Parrot* (*b*), the leffee of a coal-mine, which was in itfelf productive, was held liable to be rated; though the leffee himfelf, after paying the owners a certain fhare of the profits, which he had contracted to pay them, loft inftead of gaining money by it. In looking over the charges in this cafe, they laid ftrefs principally on the items of 70*l.* for rent and taxes of dwelling-houfes, and 110*l.* for falaries and board of the two preachers, as profits clearly taxable, befides other minor charges. If, faid they, the rector of a parifh paid perfons for cleaning his church, or, chufing to preach at night, provided candles for it, he would not be permitted to fet off thofe deductions, in eftimating the amount of the rate upon his rectory. If the profits received had been 1000*l.*, the truftees might equally have abforbed the whole, by increafing the falaries and accommodations of the preachers. So with refpect to the items for repairs and improvements, as a dwelling-houfe would not be the lefs rateable in the year when charges of that de-

(*a*) 2 *Burr.* 1053., and 1 *Blac. Rep.* 249.; and vide the cafe of *St. Bartholomew's* Hofpital, 4 *Burr.* 2435.

(*b*) 5 *Term Rep.* 593.

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fcription were incurred, though perhaps to a larger amount than the rent in the fame year; fo neither can they be fet up againft the rate upon a chapel.

The Attorney-General, *Garrow*, *Walton*, *Holroyd*, and *Scarlett*, oppofed the rate, and denied that this was like the cafe of perfons holding preferment in the Eftablifhed Church, whofe incomes arofe out of permanent funds, and would be the fame, however appropriated, after they were raifed; but here no profit at all could be raifed out of the chapel, except for the perfonal exertions of the preachers; and therefore whatever was reafonable to be allowed for this purpofe, and without which proper preachers could not be obtained, was a neceffary deduction from thofe profits. Even land is not to be rated for the grofs value of its productions, without deducting the neceffary expences of feed and cultivation by which it is rendered productive. So here the building itfelf could produce nothing without the preachers. [Lord *Ellenborough* C. J. If it were ufed for any ordinary or fecular purpofe, it would ftill be rateable for its annual value as a building; but as a chapel, the truftees make a profit of it; for they get a profit for the preachers, otherwife they would be obliged, if they engaged them at all, to pay them out of fome other fund which would be rateable.] They put the cafe (protefting, however, againft any profane inference,) of a theatre; where if the neceffary difburfements, including the reafonable falaries of the actors, exceeded the money received at the door, the proprietor could not be rated for it. If the building were ufed for the erection of a fteam engine, the expence of the fuel muft firft be deducted. [Lord *Ellenborough* C. J. We cannot take the account

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account of the quantum of profit, or the reaſonableneſs of the charges; that is for the ſeſſions to conſider: we can only conſider whether the building produces profit; and that it is found to do. There may be often great difficulties in aſcertaining the true quantum of profit, as in the caſe of rating ſtock in trade. *Bayley* J. The truſtees, by reaſon of the accommodation of the building, make of it more profit than if their preachers preached in the open air.] If the owner of a field took money from perſons who came to hear a perſon preach there, and gave all the money which he took to the preacher, he could not be liable to be rated for ſuch extra profit made of that uſe of the field. Suppoſe a building appropriated to religious worſhip, without any profit made of the pews, and without the expence of a preacher, but merely for prayer, and that the common expences were defrayed by voluntary ſubſcription; there could be no ground for rating any perſons in reſpect of it: how then does it alter the caſe, that each perſon encreaſes his ſubſcription for the purpoſe of getting a preacher. [*Bayley* J. Suppoſe they had rented the building, muſt they not have been rated for it?] That would have been a different caſe; for it would have ſhewn a tenantable value of the building, independent of the ſubſequent application of it: but here all the value ariſes from the uſe of the building; and the legal owners who are rated enjoy no ſurplus value from it, as the landlord in that caſe would do who let it at a rent. The ſame anſwer applies to the caſe of *Robſon* v. *Hyde* (*a*): there was a clear profit to the occupier over and above the neceſſary expences. And it is not pretended, if any

(*a*) *Cald.* 310.

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allowance may be made for the expence of the preachers, that the allowance here made was immoderate. [Lord *Ellenborough* C. J. There is a further item, I obferve, of 5*l.* for half a year's falary for conducting the finging in the chapel: I do not fay that it is improper; but how can that be neceffary? Nor indeed do I find any thing ftated in the cafe of *neceffary* expences, but only of the *current* expences.] Thofe expences abforb the whole receipts, leaving no furplus to the legal owners. This is an entire dedication of the building to religious purpofes, as it was in *Waldo*'s cafe (*a*) to charitable purpofes, who was held not to be rateable in that refpect; though the houfe which he provided for the purpofe of educating and maintaining the poor children had been before rated to the poor; and the poor children were as his fervants or guefts, and might have been turned out by him at any time; fo that he was as much an occupier as thefe truftees are. In rating property of every defcription, fome allowances muft always be made, and efpecially for the expences neceffary for the production of the profit. [Lord *Ellenborough* C. J. No doubt the fair average expences ought to be allowed in eftimating the quantum of the rate, but not any extraordinary expenditure which might happen to make the property unprofitable in a particular year: for where it is the fubject of annual value, the money fo laid out in one year will produce profit in the fubfequent years. The mode of eftimating the quantum of profit may be attended with difficulty. It may be afked what profit was received in the cafe of *Catherine Hall* (*b*), where the mafter and fellows had pulled down feveral houfes, and converted the fcites of them into an area

(*a*) *Cald.* 358. (*b*) *Rex* v. *Gardner*, *Cowp.* 78.

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for ornament: it may be ſaid that they had it in pleaſure. But ſhew ſome caſe where property, profitable in its nature, as land and houſes, has been held not to be rateable, except where a profitable occupation of it was negatived: and then ſhew that there is any thing in this caſe which negatives the receipt of profit. Where property is in its own nature productive of profit, it muſt be expreſsly ſtated to us that no profit is derived from it, before we can ſay it is not rateable.] To make a rateable profit, there muſt be a ſurplus beyond what is neceſſary to procure the groſs proceeds: but the truſtees had no ſuch ſurplus profit; they therefore cannot be rated, however the preachers might be rateable for their perſonal ability in reſpect of their ſalaries.

Lord ELLENBOROUGH C. J. The queſtion is whether the truſtees are rateable. In what ſituation do they ſtand to the property? In 1804 they purchaſed the ground on which they afterwards erected the chapel: they are therefore the owners of the property. If they had gratuitouſly admitted perſons into their chapel, and provided preachers for the congregation, without receiving any thing, they would have come within the caſe of the *The King* v. *Woodward and Others* (a): but obſerve the difference between the two caſes: there it was found that the truſtees did not receive any rent, or other pecuniary advantage, for the uſe of the ſeats in the Quakers' meeting-houſe: here it is ſtated that the truſtees do receive rent for the ſeats. What ſimilitude then does this bear to *Waldo*'s caſe, who gratuitouſly devoted his property to the education and maintenance of paupers, but derived no profit to himſelf? Here profit is made of the

(a) 5 *Term Rep.* 79.

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property to the full by the truftees who let out the feats, and receive pecuniary advantage from the ufe of them. And, admitting that there muft be fome expences incurred in producing the profit, it depends upon circumftances, and the mode of adminiftering the fund, what the profit fhall be. If it were abfolutely neceffary that all the fums ftated in the account of expences fhould be expended, it fhould have been exprefsly found in the cafe that they were all *neceffarily* expended in the carrying on the bufinefs of the chapel. The truftees may go on increafing their expenditure in this manner, as their profits increafe. I admit that it is not found that any of the items were fraudulently fwelled for the purpofe of this queftion: but it is not enough in thefe cafes to fhew that the expences laid out in any particular year abforbed the profits of that year; for the benefit of fuch expences may be derived in future years, as is often the cafe with improvements of farms. If valuable land in the neighbourhood of a town be covered with buildings in one year, the expences of that year would probably greatly exceed its profits; but the land would not ceafe to be valuable and rateable on that accouut. Whether thefe which are ftated were neceffary expences or not, I cannot take upon me to fay from the cafe; but it fhould at leaft have been found that they were all *neceffary* to produce the render of the rent received. This is not like the cafes where perfons have been held not to be rateable for property, as not being in the occupation of it; for thefe appellants are the original proprietors of the land, on which they have erected a chapel by voluntary fubfcription, under no reftriction as to the profits to be derived from it, and in the actual receipt of rents, which they have applied in the manner ftated.

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GROSE J. The firſt queſtion is whether there is any thing rateable in this caſe; and here there is clearly rateable property; for there is land, and a building which products profit. But it is ſaid that it does not produce profit ſufficient to warrant a rate on theſe defendants in reſpect of it. But that depends upon the manner in which they chuſe to apply the proceeds. It does in fact produce profit; and they diſpoſe of it as they pleaſe afterwards. How then does this differ from the caſe of other buildings which produce profit? If this be not rateable, on account of the ſubſequent application of the profits by the truſtees to the benefit of others, why ſhould any eſtate which a man holds in truſt be rateable. Then, 2dly, the truſtees who receive the profits are the occupiers of the property, and therefore they are liable to be rated for it.

LE BLANC J. The ſubject-matter of this rate is within the ſtat. 43 *Eliz. c.* 2., which directs the occupiers of lands and houſes to be rated. Theſe appellants purchaſed the land, and erected a building on it to be uſed as a chapel, and now let out the ſeats, and receive the rents for them: they are therefore the occupiers of the building. Then the only queſtion is whether they are liable to be rated for it, on the ground that it is not valuable property. It is let out at an annual rent: but it is objected that though they receive profit in the firſt inſtance, yet they afterwards diſpoſe of the whole in the eſtabliſhment, in paying the ſalaries of the miniſters, and in defraying other expences of attendants and repairs. I agree that this is in ſubſtance a rate on the miniſters; for if they had let out the pews and received the rents, they would only have received the ſurplus profit, after payment

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of all the neceſſary expences of the chapel: but the pews are let out by thoſe who are in effect the truſtees for the miniſters; for they pay over to them ſo much as remains after defraying the expences. The truſtees therefore muſt be conſidered as the occupiers, becauſe the property is in them, and they let out the pews; and they are therefore rateable for the profits in the ſame manner as the miniſters themſelves would be, if theſe latter let out the pews.

BAYLEY J. The property itſelf is rateable, and the truſtees are the proper perſons to be rated for it. It is a houſe, and the ſtatute of *Eliz.* ſays that the occupiers of houſes are rateable. It produces profit; for certain ſums are annually paid into the hands of the perſons rated by thoſe who rent the pews. Then it is objected that part of the money ſo received, which is applied to the ſalaries of the preachers, is referable to them, and not to the houſe, and that if there were no preachers there would be no pew-rents received. I agree that the money ſo received is partly referable to the preachers, but a part is alſo referable to the houſe itſelf, in reſpect to the ſuperior accommodation afforded by it to thoſe who attend the preachers; for ſuch large ſums would not be paid to hear them in the open air. This then is not like *Woodward*'s caſe; nor like the caſe of Mr. *Waldo*, who dedicated his property to the charitable purpoſe of educating and maintaining poor children; for there was no profit made of the meeting-houſe in the one caſe, or of the property dedicated to the charity children in the other: but here a profit was made of the property. And there is no hardſhip in ſaying that the truſtees ſhall pay the rate; for they will ſtop in tranſitu

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ſo much as they pay for this purpoſe; and the miniſters are not the proper perſons on whom to impoſe the rate on the building, in reſpect of their ſalaries. The truſtees are not under any obligation to make the payments to the extent ſtated: they have paid the money in fact; but they were under no obligation to do ſo at all events. This therefore being property, which in its nature is rateable, and profit being in fact made of it, and that profit paſſing, in the firſt inſtance, through the hands of the truſtees, I ſee no doubt but that they are rateable for it.

Order and Rate confirmed.

The KING *againſt* CHANDLER.

Saturday, June 22d.

The ſtat. 12 *Car.* 2. *c.* 24. *ſ.* 45. giving ſummary juriſdiction in offences againſt the exciſe, committed within the limits of the chief office of exciſe in *London*, to the chief commiſſioners, &c., and "within all or any other the counties, cities, &c. within this "kingdom, &c. to two or more *juſtices of the peace reſiding near* to the place where ſuch "offence ſhall be committed," muſt be underſtood to be confined to juſtices of the peace *of the county*, &c. wherein the offence was committed: and therefore if a defendant be convicted by two reſident juſtices of the peace upon the ſtat. 19 *G.* 3. *c.* 50. *ſ.* 2. for having in his cuſtody and poſſeſſion a private and concealed ſtill for illicit diſtillation; and the evidence only ſhew that his *houſe* was in the county, and that the ſtill was found concealed in *the garden of the ſaid houſe*; ſuch garden not appearing to be in the ſame county; the conviction is bad.

2dly, The leaving *with a woman at the defendant's houſe*, whom the witneſs *believed* to be a menial ſervant of the defendant, a *copy* of the ſummons to appear and anſwer to the offence charged, (to which woman the original was alſo ſhewn,) is a ſufficient ſummons within the ſtat. 32 *G.* 2. *c.* 17.

3dly, The information charging the defendant with having in his cuſtody and poſſeſſion certain private and concealed veſſels for diſtillation, to wit, *one ſtill, &c.*, one head, &c.; (for each of which the offender is liable to a ſeparate penalty;) and then alleging that he forfeited for *the ſaid ſtill one penalty*; and the juſtices, after proof of the *ſeveral offences* ſtated in the firſt part of the information under the videlicet, convicting the defendant in the *ſingle* penalty prayed for "*for his ſaid offence mentioned in the ſaid information*; ſuch conviction was holden to be ſufficiently certain and good.

4thly, The information, appearing to be laid more than 10 days after the offence charged and proved to be committed, is ſufficient upon the ſtat. 19 *G.* 3. *c.* 50. *ſ.* 2; without negativing that the owner had, within 10 days after the ſeizure, claimed the veſſels ſeized.

5thly, Quære how far evidence that the ſtill was found concealed in the garden of the defendant's houſe, apparently juſt worked off; but without proof that the defendant himſelf was in or near his houſe at the time; would warrant a conviction of him as having ſuch illicit and concealed ſtill *in his cuſtody and poſſeſſion*.

THIS was a conviction of the defendant by two juſtices of the peace for *Middleſex*, in one mitigated penalty of 100*l.*, for having in his *cuſtody and poſſeſſion* a private

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ftill, contrary to the ftat. 19 *Geo.* 3. *c.* 50.(*a*) The conviction (*b*) fet out that on the 13th of *April* 1811, at *Tottenham*, in the county of *Middlefex*, *J. B.*, *collector of excife*, exhibited before *E. R. M.* and *T. R.*, two juftices of the peace for the faid county, *refiding near to the place* where the offence after-mentioned was committed, a complaint and information, &c. that within three months laft paft, viz. on the 28th of *March* laft, at the parifh of *Edmonton*, in the faid county, one *T. A.*, being then and there an officer of excife, did then and there difcover and find, in the cuftody and poffeffion of the defendant, *certain private and concealed veffels* for the making, preparing, and keeping low-wines, fpirits, and other materials preparing for diftillation, &c., to wit, one private and concealed *ftill*, one private and concealed head, fix private and concealed wafh-backs, &c. contrary to the form of the ftatute, &c. And that the defendant, being the perfon in whofe cuftody and poffeffion the *faid* private and concealed *ftill* was fo difcovered and found as aforefaid, forfeited, *for the faid private and concealed ftill*, 200*l.*, by virtue of the ftatute, &c.; whereupon the informant prayed the judgment of the juftices, and to have a moiety of the penalty: and then he prayed the juftices that the defendant might be fummoned to anfwer. Whereupon the juftices, on the faid 13th of *April* 1811, at *Tottenham*, in the county of *Middlefex*, iffued their fummons to the defendant, requiring him to appear before them there on the 17th of *April*, and authorized any officer to ferve the fummons. The conviction then proceeded to ftate that at the day and place appointed the informant appeared, but the defend-

(*a*) And fee 23 *G.* 3. *c.* 70.

(*b*) Such parts only are particularly ftated, upon which objections were taken.

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ant made default. Thereupon *C. S.*, an officer of excise, (in proof of the summons) deposed that the defendant was not at home, that he left *a copy of the said summons with a woman called* Sarah Woodward, *at the defendant's said house at* Edmonton, whom the witness believed to have been then a menial servant of the defendant; and at the same time shewed to her the original summons. Thereupon the justices proceeded to examine the matters of the information, and set out the evidence of an excise officer, that on the 28th of *March* last he went, in company with certain assistants, to the defendant's *house* at *Edmonton*, in the county of *Middlesex*, to search the same, by virtue of a magistrate's warrant; that he found, under a pig-stye *in the garden of the said house*, a private still, complete, just worked off, a worm-tub and worm, and six wash-backs, &c. containing 150 gallons of wash, &c. That the witness seized the whole, and worked off the wash, &c. on the premises, and produced 33 gallons of spirits, and took the whole away. Another witness negatived the entry by the defendant of any still, or of any premises for distilling, at *Edmonton*. On this evidence the justices proceeded to convict the defendant, and to adjudge that "*for his said offence* mentioned in the said information he has forfeited 200*l.*;" which, by virtue of the statutes, they mitigated to 100*l.*

The objections taken to this conviction by *Lawes* were these: 1st. That the defendant was not properly summoned, inasmuch as he was only served with a *copy* of the summons instead of the original. And that the statute 32 *Geo.* 2. *c.* 17., which provides that a summons left

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at the party's houfe, &c. fhall be deemed good fervice; recognizing as it does the neceffity of perfonal fervice at common law in thefe cafes, and fubftituting the leaving *fuch* fummons at the party's houfe; only authorizes the leaving of the *original* fummons, and not a *copy* of it, as good fervice.

Lord Ellenborough C. J. Where notices are delivered to a party, or *left* at his houfe or ufual place of refidence, it is the conftant practice to deliver or leave a *copy*: and this act only fubftitutes the leaving of that which would otherwife have been perfonally delivered to the party. The whole purpofe of the act is anfwered by this.

2d. Objection. It is not fhewn that the copy was either left at the defendant's houfe, or with his menial fervant; but only that it was left *with a woman* at his houfe, whom the witnefs *believed* to be his menial fervant.

Lord Ellenborough C. J. Where a notice is ftated to be left with a fervant, it muft for the moft part be a matter of belief, and not of certain knowledge, that the perfon was the fervant of the party. The witnefs cannot be fuppofed to be prefent at the time of the contract of fervice; but here he found a perfon in the houfe, apparently refiding there as a menial fervant; and that was enough for his belief that fhe was fo.

3d Objection. The information charges the defendant with having in his cuftody and poffeffion *feveral* pri-

vate and concealed veſſels uſed in diſtillation; (and ſo is the proof,) for which he was liable to forfeit ſo many diſtinct penalties of 200*l.*; but only *one* penalty is claimed by and adjudged to the informer. The conviction ſhould have been commenſurate with the charge and the proof, and being for too little is as faulty as if it had been for too much. In *Rex* v. *Solomons* (*a*), where two diſtinct offences were charged in the information, a conviction for *the ſaid offence* was held bad.

Le Blanc J. There the penalty was claimed for the *ſaid* offence; and two having been before charged, it was uncertain to which of them the penalty was referable: but here the information ſpecifies for what particular offence the ſingle penalty is claimed, namely, for having in his cuſtody and poſſeſſion the ſaid private and concealed ſtill, which is one of the veſſels before mentioned.

Bayley J. It could not be told in *Solomon*'s caſe in reſpect of which of the two offences charged the penalty was adjudged: here it is certain.

Lord Ellenborough C. J. Here it is diſtinctly ſtated and found that he kept *a ſtill*, and he is convicted of that diſtinct offence. Other matters indeed are charged; but there is no uncertainty here, as there was in that caſe, upon what the condemnation was founded. Here the conviction is neither for too little, nor for too much; but for juſt enough.

(*a*) 1 *Term Rep.* 249.

4th Ob-

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4th Objection. The penalty is given by the stat. 19 *Geo.* 3. *c.* 50. *s.* 2, which is only in case the true owner shall not claim the vessel seized within 10 days; such claim therefore ought to have been negatived before the penalty can attach upon a person of the defendant's description: it over-rides the whole clause.

Lord ELLENBOROUGH C. J. The claim merely relates to the forfeiture of the vessel; but after the 10 days passing without any such claim, there is nothing to prevent the informer from proceeding for the penalty against the person in whose custody and possession it is so found. Here the seizure was made on the 28th of *March*, and the information was not exhibited till the 13th of *April*.

5th Objection. The evidence does not support the charge that the still was found in the custody and possession of the defendant; it is only proved to have been found *in the garden of his house*: it might have been put there by some other person: it is not even stated that the garden was in the defendant's possession. He referred to what was said in *Rex* v. *Abbot* (*a*), that where goods are found in the party's house, his knowledge shall be presumed; but not where they are found in his grounds.

GROSE J. It is found concealed in the garden of his house, with the appearance of having been recently worked: was not this evidence sufficient for the magistrates, who in these cases are put in the place of a jury, to find the fact, that it was in the defendant's custody and possession?

(*a*) *Dougl.* 553. This was said arguendo.

6th Ob-

6th Objection. It does not appear that *the garden* where it was found is in the county of *Middlesex*, within the jurisdiction of the convicting magistrates; it is only proved that the defendant's *house* is within the county. And he cited *Rex* v. *Hazell* (*a*).

Dampier, contrà, was called upon by the Court to answer the two last objections, particularly the 6th, which they said was the material objection. As to the 5th, he argued that it was sufficient if there were any evidence from whence the justices might draw the conclusion that they had done; as in *Rex* v. *Smith* (*b*): and here there was ample evidence to warrant it; for not only was the still found in the defendant's garden close to his dwelling-house, but it was then recently worked off. [*Le Blanc* J. observed, that it was not stated that the defendant was either in the house or near the spot at the time.] As to the last objection; if the garden may not be taken to be included in the description of the house, which is stated to be in the county of *Middlesex*; at any rate, it is not necessary that it should so appear to be; for by the act of the 12 *Car.* 2. *c.* 24. *s.* 45. (*c*), giving jurisdiction to country magistrates to convict offenders against the excise, it is enough that they *reside near to the place* where the offence was committed, as these justices are stated to have done.

(*a*) 13 *East*, 139.

(*b*) 8 *Term Rep.* 588.; and see *Rex* v. *Crisp*. 7 *East*, 389.

(*c*) By that clause "all such forfeitures and offences made and committed within the immediate limits of the chief office (excise) in "*London* shall be heard, adjudged, and determined by the chief commissioners and governors of excise, &c.: and all such forfeitures and "offences made and committed within all or any other the counties, "cities, towns, or places within this kingdom, or dominions thereof, "shall be heard and determined by any two or more of the justices of "the peace *residing near to the place where such forfeitures shall be made or offence committed.*"

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Lord ELLENBOROUGH C. J. It does not follow that the garden is in the county of *Middlefex*, becaufe the houfe is ftated to be there; the houfe may be in one county, and the garden in another: it does not therefore appear that the offence was committed within the jurifdiction of the convicting magiftrates. For the ftatute of *Car.* 2., giving jurifdiction to juftices of the peace refiding near the place where the offence was committed, muft be taken to mean juftices of the peace of the fame county where the offence was committed refiding near the place.

Per Curiam, for this laft objection,

Conviction quafhed.

Saturday, June 22d.

How and Another, Executors of NICHOLLS, *againft* HALL.

In trover for a bond the plaintiff may give parol evidence of it to fupport the general defcription of the inftrument in the declaration, without having given the defendant previous notice to produce it; as the nature of the action gives fufficient notice to the defendant of the fubject of inquiry, to prepare himfelf to produce it, if neceffary, for his defence.

THE plaintiffs declared in trover for feveral bonds and deeds ftated to be in force, amongft others, for a bond, defcribed in the count as a bond of one *Jofeph Warrilow* for 400*l.*, conditioned to pay 200*l.* with intereft, after a day therein fpecified. At the trial before *Lawrence* J. at *Stafford*, the plaintiff called *Jofeph Warrilow*, the obligee of the bond, who proved that, before the action brought, money was demanded of him by the defendant and his wife upon the bond, which they then produced, and which had been given to the teftator *Nicholls*, who was the father of the defendant's wife. The obligee told them, that he had orders from the executors not to pay it to any but to them or their order. The witnefs then ftated, that *Nicholls* had lent him 200*l.*, for which he had given him a fecurity, and was proceeding

ceeding to give parol evidence of the bond in queſtion, when objection was taken that no notice to produce it had been given: and upon the authority of *Cowan* v. *Abrahams* (*a*), the plaintiff was nonſuited. This nonſuit was moved to be ſet aſide in the laſt term by *Jervis* (and *Puller*,) on the ground that in trover no notice to produce the thing ſought to be recovered was neceſſary, whether it was a written inſtrument, or goods of any deſcription. And the caſes of *Jolley* v. *Taylor* (*b*), before *Mansfield* C. J. and *Bucher* v. *Jarratt* (*c*), in C. B. were referred to, as having overruled the opinion of Lord *Kenyon* in *Cowan* v. *Abrahams*.

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Dauncey and *Abbott*, in ſhewing cauſe, admitted that the opinion of the majority of the Court of C. B was againſt them, but relied on the opinion of this Court in *Cowan* v. *Abrahams*, confirming Lord *Kenyon*'s deciſion at niſi prius, and on that of the learned Judge before whom this caſe was tried; and who was aware at the trial of the caſe of *Jolley* v. *Taylor*, which was then cited. [Lord *Ellenborough* C. J. Is not the very nature of the action notice to the defendant to be prepared for the proof to be offered?] So it might have been ſaid to be in the former caſes: but the principle on which the objection is founded is that the party ſhall give the beſt evidence which the nature of the thing will admit of; and that, in the caſe of written inſtruments, is the inſtrument itſelf; unleſs where it is in the hands of the adverſe party; and then notice muſt be given to produce it before parol evidence of it can be admitted.

(*a*) 1 *Eſp. N. P. Caſ.* 50. (*b*) 1 *Campb. N. P. Caſ.* 143.
(*c*) 3 *Boſ. & Pull.* 143.

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Lord Ellenborough C. J. The queſtion is whether, where the form of the action gives the defendant notice to be prepared to produce the inſtrument, if neceſſary to falſify the plaintiff's evidence, it ſhall be neceſſary to give him another notice to produce it. Suppoſing the thing converted had been a book, inſtead of a bond, could not trover have been maintained without giving the defendant notice to produce it. The plaintiff is to ſhew, as well as he can, what the inſtrument is that he ſeeks to recover as his own from the poſſeſſion of the defendant: and if he give a wrong deſcription of it, the defendant may ſet it right by producing the thing. What further notice can be neceſſary to ſhew that the plaintiff means to charge the defendant with having poſſeſſion of the inſtrument, than the declaration itſelf. I remember an indictment tried before the late Mr. Juſtice *Buller*, againſt a man of the name (I think) of *Spragge*, for forging a note, which he afterwards got poſſeſſion of and ſwallowed; and parol evidence was permitted to be given of the contents of the note, though no notice to produce it had been given: but there indeed it may be ſaid that ſuch a notice would have been nugatory, as the thing itſelf was deſtroyed. Where the chattel converted happens to be a writing, the nature of the action and the charge in the declaration give notice to the defendant of the ſubject of inquiry.

Grose J. was of the ſame opinion.

Le Blanc J. Where the contents of a written inſtrument may be proved as evidence in a cauſe, and it is uncertain beforehand whether or not ſuch evidence will be brought forwards at the trial, we ſee the good ſenſe

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of the rule which requires previous notice to be given to the adverse party to produce it if it be in his possession, before secondary evidence of its contents can be received, that he may not be taken by surprize: but where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice; though a practice has crept in of giving such further notice, in order to prevent any question. The defendant must, from the nature of the thing, be prepared to produce the true instrument, if the evidence given by the plaintiff describe it untruly. If notice to produce the instrument were necessary to be given in a case of this kind, I fear it would extend to every case where a man was charged with stealing a note, that the prosecutor, if he had not gotten it from him again, must give him notice to produce it, before he could give evidence of the felony (*a*).

Rule absolute.

(*a*) *Bayley* J. was sitting at *Guildhall*.

The KING *against* DE BROUQUENS.

Wednesday, June 26th.

Under the statutes concerning bastards, no order of filiation or for payment of the expences can be made, unless the child be born alive.

AN order of bastardy was made by two justices of the peace for the county of *Cumberland*; in which, after reciting that it had appeared to them, as well on the complaint of the churchwardens and overseers of the poor of the parish of *Millom*, in that county, as upon the oath of *Eliz. Atkinson*, single woman, that she, on the 13th of *September* 1810, was delivered of a *dead-born* male bastard child at *Shands*, in the said parish; and that the said *E. A.*, *mother* of the said bastard child, hath been

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chargeable to the said parish of *M.*; and further that the defendant begot the said bastard child on the body of the said *E. A.*, &c.: the justices concluded by adjudging the defendant to be *the reputed father of the said bastard child*, and ordered him to pay to the parish officers 6*l.* 14*s.* 6*d.* "for and towards the lying-in of the said *E. A.*, and for the expences incurred in apprehending the defendant, and for making this order."

The order and indictment having been removed by certiorari into this court, *Walton* on a former day moved to quash that order, on the ground that the justices had no jurisdiction to make an order of filiation in the case of a *dead-born* bastard, the statutes relating to this matter including only children who were born alive, to whom alone the relative terms of "bastard *child*" and "reputed *father*" could in strictness apply.

Scarlett, who now opposed the rule, observed shortly, that the object of the several statutes (*a*) upon this subject was to indemnify the parish against the expences of the woman's lying-in, as well as against the future maintenance of the child, if born alive; though he admitted that the words of some of the clauses bore strongly against the extension of the order to the case of a dead-born child; particularly the 2d section of the stat. 18 *Eliz. c.* 3., which speaks of "bastards begotten *and born* out of "lawful matrimony, being left to be kept at the charge "of the parish where they are *born*." But he urged that the stat. 49 *Geo.* 3. *c.* 68. meant to go further, and provide at all events for the charges and expences incident to the

(*a*) Vide 18 *Eliz. c.* 3. *s.* 2. 13 & 14 *Car.* 2. *c.* 12. *s.* 19. 6 *Geo.* 2. *c.* 31. *s.* 1.; and 49 *Geo.* 3. *c.* 68. *s.* 2.

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birth of the baſtard, whether it died or not; an event which is regarded in the ſecond ſection: and that the term *born* may, in its popular ſenſe, be applied to a child born dead.

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Lord ELLENBOROUGH C. J. In order to come under the denomination of a *baſtard*, muſt not the child be born alive. All the proviſions in the ſeveral ſtatutes aſſume the birth of a child, which of courſe muſt be born alive.

GROSE J. No dead ſubſtance is the object of legiſlative proviſion in any of the acts.

LE BLANC J. Many of the proviſions, even in the ſtat. 49 *G*. 3. *c*. 68., are quite inapplicable to a dead child; and all through the act there are words of reference to a baſtard *born* out of lawful matrimony.

The Court then made the rule abſolute for quaſhing the order of baſtardy; and afterwards *Walton* moved to quaſh the indictment; for which a rule niſi was then given, which was afterwards made abſolute without oppoſition.

Wednesday, June 26th.

The KING *against* The Inhabitants of DARLEY ABBEY.

Where the pauper applied to the owner of a farm for *the milking of a cow*, which it was agreed that he should have *for the season*, for 9*l*., and the particular cow was then pointed out; though nothing was said as to how or where the cow was to be fed, further than that he was then told that the owner's farming man would inform him *in what* PASTURE *the cow would be first milked*; of which he was afterwards informed, and so from time to time as the pasture was changed: held that this was sufficient evidence of a contract for the taking of a *pasture fed* cow, and by consequence of a tenement within the statute, so as to confer a settlement on the pauper, who rented another tenement at the same time of the annual value altogether of 10*l*.

WILLIAM *Bainbridge*, his wife and children, were removed by an order of two justices from *Duffield* to *Darley Abbey*, in *Derbyshire*; and the sessions, upon appeal, confirmed the order, subject to the opinion of this Court upon the following case:

The pauper for two years resided in a house, and occupied a garden, in *Darley Abbey*, of the annual value of 8*l*. 18*s*.; and during the whole of that time he and one *John Meyer* jointly hired the milking of a cow in the following manner: The pauper applied to Mr. *Evans*, at whose factory he and *Meyor* worked, for the milking of a cow betwixt them. Mr. *Evans* referred the pauper to his agent, Mr. *Harvey*, to agree for the cow. Mr. *Harvey* agreed they should have a cow for the season for 9*l*. The particular cow was pointed out. The cow was at that time upon a large farm of Mr. *Evans*, which he occupied near the factory. Nothing was said as to how or where the cow should be fed, more than that Mr. *Harvey* said, that *Jerom*, Mr. *Evans*'s farming man, would inform the pauper in what pasture the cow would be first milked: and he did inform him; and so from time to time when the pasture was changed, that he might know where to go to milk her. The cow was grazed in Mr. *Evans*'s pastures in the same farm for the whole of the two seasons with other cows, which were let in the same way to other workmen of Mr. *Evans*, and with other cattle belonging to Mr. *Evans*. The pauper and his partner always milked the cow during the whole time. They hired the

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ſame cow for four ſucceſſive ſeaſons, and the cow was always grazed in the ſame way, on Mr. *Evans*'s farm. The ſummer paſturage of the cow alone was admitted to be of the value of 5*l.* for each ſeaſon.

Clarke and *Balguy*, jun. after referring to the caſes of *The King* v. *Hollington* (*a*), and *The King* v. *Stoke-upon-Trent* (*b*), as deciding this caſe, were ſtopped by the Court.

Topping, *Nolan*, and *Denman*, contrà, ſaid, that this was diſtinguiſhable from all the former caſes, where the ſettlement had been eſtabliſhed by takings of this kind; for in all of them it was part of the terms of the contract, that the cows were to be *depaſtured* by the owner. But in *The King* v. *Tiſbury* (*c*), *Lawrence* J. ſaid, that a contract to feed cows generally, under which they might be fed with green tares bought in the market, would not be a tenement. Now here it is ſtated as a fact that, at the time of the contract made, which was for the milking of a cow, nothing was ſaid as to where the cow ſhould be fed: the owner was under no obligation to graze the cow at all, or to graze her on his own land. [*Groſe* J. The pauper was to have the cow *for the ſeaſon*: and muſt not that be underſtood as a contract for the cow to be fed in the ordinary way of dairy cows, that is, *on paſture*, *for the ſeaſon*, where ſhe was to be milked. Lord *Ellenborough* C. J. If the cow had been fed on hay inſtead of on paſture, would not the pauper have had an action for the breach of this contract upon the evi-

(*a*) 3 *Eaſt*, 113. (*b*) 10 *Eaſt*, 496.

(*c*) *M.* 43 *G.* 3. 1 *Nol.* 506., under the name of *The King* v. *Diſbury*, which was now ſtated to be by miſtake for *Tiſbury*.

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dence of it ſtated?] It was no part of the contract where the cow was to be fed. [Lord *Ellenborough* C. J. There is no expreſs agreement that the cow was to be depaſtured; but is it not to be implied from the nature of the contract and the circumſtances of the caſe? If indeed the cow might, under this contract, have been fed elſewhere upon hay or grains, the conſequence would follow, that this was not a taking of a tenement.] At leaſt no particular lands were aſſigned for the feeding of her: the owner might have fed her upon the land of another perſon elſewhere: and though in fact the owner's ſervant informed the pauper in which paſture the cow was firſt to be milked, yet that was not neceſſary by the contract. [Lord *Ellenborough* C. J. The only queſtion is, whether this was not a contract for a paſture-fed cow? and does not *ſeaſon* mean *paſture ſeaſon?* Can the word *ſeaſon* be conſtrued in this caſe without reference to *paſture?*] It merely means the *milking ſeaſon*, and may extend beyond paſture ſeaſon. The paſture was pointed out, in order that the pauper might know where to find the cow. [*Groſe* J. Then muſt it not be underſtood, that the cow was to be fed in the paſture where ſhe was to be milked? Lord *Ellenborough* C. J. Why was the paſture changed if the cow was not to be fed there, but only to be there milked? It was neceſſary, too, that ſhe ſhould be fed upon ſome grounds of the owner, to which the pauper might have acceſs for the purpoſe of the milking.] In all the former caſes of ſettlement, it was part of the contract for the taking of the cows, that they were to be fed upon certain lands; but no ſuch contract is found by the ſeſſions in this caſe, but only the mere fact that they were ſo fed.

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Lord ELLENBOROUGH C. J. It has been too long ago decided to be now ſhaken, that the hiring of the feeding of cows is a ſufficient taking of a tenement to confer a ſettlement within the ſtatute, if the tenement be of ſufficient value: and here the neceſſary value is made up by the contract which the pauper entered into for hiring the milking of a cow in the manner ſtated in the caſe. A contract for the mere milking of a cow is indeed no more than a contract for a perſonal thing, and therefore unleſs through the medium of the cow he contracted for the pernancy of the profit of land, there could be no ſettlement gained: but the queſtion is, whether by this contract, explained as it is by the ſubject-matter and the circumſtances, the owner was not to furniſh the pauper with a cow to be fed upon the land. Where parties underſtand the ſubject of their contract, a few words are ſufficient for the terms of it, and ſometimes it may be collected from their acts, without words. Here the contract was made by the pauper with a man who had a farm and cows then feeding on it. To him the pauper applied, as the caſe ſtates, for the milking of a cow; and *Harvey* agreed that the pauper ſhould have a cow *for the ſeaſon* for 9*l.* and the particular cow was pointed out. The term *ſeaſon* would import, according to the ſubject-matter, during the time that the graſs grew on the land to feed the cow. The cow was then fed upon the owner's farm; but nothing was *ſaid* how or where the cow ſhould be fed: that is, the particular land on which the cow was to be fed was not mentioned, but the pauper was told in what *paſture* the cow would be firſt milked, and whenever the paſture was changed he was informed of it. Then is it not to be fairly underſtood, when the cow was always to be milked on

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paſture-ground, that ſhe was alſo to be fed there. What could be meant by changing the paſture, but for the purpoſe of her being fed on freſh paſture? If then the owner had fed the cow on dry food, as grains, inſtead of paſture, it would have been a breach of the contract. The parties meant to contract for a paſture-fed cow for the purpoſe of milking. The principle eſtabliſhed by the former caſes cannot now be queſtioned, and this caſe is governed by it.

Grose J. The pernancy of profits of land muſt be eſtabliſhed, in order to confer a ſettlement by this kind of contract; and here I think it was eſtabliſhed.

Le Blanc J. It has been long ſettled that the hiring of a dairy of cows, whether conſiſting of one or more cows, where the perſon who lets the cows is to feed them on land, is ſuch a taking of a tenement within the ſtatute as will give a ſettlement. Nobody who reads this caſe can doubt that this was a hiring by the pauper of a cow to be fed on the paſture of him who let it. The facts are that the pauper applied to Mr. *Evans*, the owner of the farm on which there were cows, for the milking of a cow: the owner referred him to his agent, *Harvey*, with whom the pauper agreed for a cow for the ſeaſon at 9*l.*, and a particular cow was pointed out. And though nothing was ſaid as to how or where the cow was to be fed, yet *Harvey* told him then that the owner's farming-man would inform him in what paſture the cow was to be firſt milked; that is, on what particular paſture ſhe was then fed. Is it not evident from this that it was a contract for the hire of a paſture-fed cow? It is objected that

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no ſpecific land was pointed out on which the cow was to be fed: but that need not be agreed upon; nor need it have been fed upon the *ſame* land on which the owner was reſiding. It is clear however that this cow was to be fed upon the farm in the occupation of *Evans*, or upon land that he was to provide for her; and in fact ſhe was depaſtured upon the farm all the ſeaſon.

BAYLEY J. The magiſtrates ought not to be induced to ſend up caſes for our opinion, if they have no doubt upon the queſtion in their own minds, in order to avoid incurring unneceſſary expences. Here there can be no doubt that the contract was for the milking of a cow, which ſhould be paſture-fed during the ſeaſon either upon land of the farm in the pariſh where the parties contracted and were reſiding, or at leaſt within a reaſonable diſtance of it, in order that the pauper might have a convenient opportunity of coming to milk the cow. And if the owner had fed the cow otherwiſe than upon paſture, an action by the pauper would have lain for a breach of the contract.

Order of Seſſions confirmed.

The KING *againſt* The Juſtices of DENBIGHSHIRE.

Wedneſday, June 26th.

A Proteſtant Diſſenter, merely ſtating himſelf as one who "preaches "to ſeveral "congregations of Proteſtant Diſſenters," without ſhewing that he has any *ſeparate congregation* attached to him, *as ſuch teacher or preacher*, is not entitled to be admitted by the juſtices in ſeſſions to take the oaths and make and ſubſcribe the declaration as required by the toleration act, 1 *W.* & *M. c.* 18., in order to qualify himſelf, under the 8th clauſe of that ſtatute, to officiate as ſuch teacher or preacher.

J. WILLIAMS moved, upon the 8th ſection of the general toleration act 1 *W.* & *M. c.* 18., for a mandamus to the juſtices of the peace of the county of

Denbigh

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Denbigh assembled at their next general sessions of the peace, to admit *David Lewis* to take the oaths, and make and subscribe the declaration required under that statute. This was moved upon an affidavit of *David Lewis*, in which he described himself as "a Protestant Dissenter," who "preaches to several congregations of Protestant Dissenters;" stating the circumstances of his application to these justices at their last sessions, and of his tendering himself to take the oaths, and make and subscribe the declaration mentioned in the statute: that the chairman of the court required of him *a certificate* of his having a separate congregation; and that, upon his saying *that he had no separate congregation*, the sessions refused to administer the oaths to him, &c. The words of the toleration act were now referred to as being very general. The first section states, that neither of certain disabling statutes therein mentioned "shall be construed to extend to any person dissenting from the church of "*England* that shall take the oaths mentioned in the "stat. 1 *W.* & *M.* *c.* 1., and shall make and subscribe "the declaration mentioned in the stat. 30 *Car.* 2. st. 2. "*c.* 1.; which oaths and declaration *the justices of peace*, "at the general sessions of the peace to be held for the "county or place where such person shall live, *are hereby required to tender and administer to such persons as shall* "*offer themselves to take, make, and subscribe the same*, and "thereof to keep a register." And then the 8th section enacts "that no person dissenting from the church of "*England, in holy orders*, or *pretended holy orders*, or *pretending to holy orders*, nor *any preacher or teacher* "*of any congregation* of Dissenting Protestants, that "shall make and subscribe the declaration aforesaid, and

take

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" take the said oaths at the general or quarter sessions of " the peace, to be held for the county, &c. where such " person lives; which court is hereby impowered to ad- " minister the same; and shall also declare his approba- " tion of and subscribe the articles of religion men- " tioned in the stat. 13 *Eliz. c.* 12., except," &c. shall be liable to the pains and penalties of the stat. 17 *Car.* 2., *c.* 2., and 13 & 14 *Car.* 2. *c.* 4. " for officiating in any " congregation for the exercise of religion permitted and " allowed by this act." This provision, it was contended, applied to all teachers or preachers of Protestant dissenting congregations, though the teacher or preacher applying had no certain or specific congregation attached to him; and that there was no pretence for requiring, as the chairman of the sessions had done in this case, a *certificate* from any congregation that the party applying was the teacher or preacher of such congregation. Such a certificate was neither required by that statute, or by those of the 10 *Ann. c.* 2., or 19 *Geo.* 3. *c.* 44.

Lord Ellenborough C. J. then enquired whether the person applying now swore to the fact of his being the teacher or preacher of any separate congregation of Protestant Dissenters? and being answered in the negative;

Bayley J. asked if he were not the teacher or preacher of any certain congregation, under what description in the 8th clause of the act he brought himself?

J. Williams answered, as a teacher or preacher of several congregations of Protestant Dissenters, though not attached to any particular separate congregation of his

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own: which, he contended, was not neceſſary within the ſcope and intention of the general toleration act; for that was meant to relieve, on the terms preſcribed, officiating diſſenting miniſters from certain penalties impoſed by former ſtatutes for teaching or preaching at all, whether to ſeparate congregations of their own, or to congregations in general of Proteſtant Diſſenters; and therefore the act ought to have a conſtruction co-extenſive with the penal ſtatutes, againſt which it was meant to relieve upon the terms of taking the oaths and making and ſubſcribing the declaration mentioned. And at all events the ſtatute muſt have ſome latitude of conſtruction; otherwiſe every perſon applying to the ſeſſions for this purpoſe, and ſtating himſelf to be then a teacher or preacher of a congregation, before he has qualified himſelf by taking the oaths and making the declaration required, would thereby admit himſelf to have been guilty of an offence.

Lord Ellenborough C. J. The chairman of the Seſſions might have been wrong in aſking this perſon for a certificate of his having a ſeparate congregation; but ſtill, to entitle himſelf to ſucceed in his application, he ought to ſhew himſelf to be the acknowledged teacher or preacher of ſome particular congregation, or to bring himſelf within ſome other qualifying deſcription in the act, in order to be entitled to the exemption which he ſeeks.

Grose J. concurred.

Le Blanc J. If the party be in holy orders, or pretend to holy orders, though he have no particular congregation of his own, he would come within the 8th

clauſe;

clause: but if he apply merely as a teacher or preacher, not pretending to holy orders, he must state himself to be the teacher or preacher of some particular congregation of Protestant Dissenters, by whom he is recognized in that character.

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BAYLEY J. This clause of the toleration act meant to relieve persons who had Protestant dissenting congregations severally attached to them, at the time they made the application to the sessions, from the penalties imposed by former acts for officiating as preachers of such con-

Rule refused (*a*).

(*a*) See the 11th section of the toleration act, which exempts from serving on juries and bearing parochial or ward offices "every teacher or "preacher in holy orders or pretended holy orders, that is a minister, "preacher, or teacher of *a congregation*, that shall take the oaths.

BOWRING *against* PRITCHARD.

Thursday, June 27th.

Writs issued out of this court against persons within the borough of *Southwark* are to be directed to the sheriff of the county, who issues his mandate thereupon to the bailiff of the borough, and not to the bailiff in the first instance.

DAMPIER having before obtained a rule nisi for discharging the defendant out of custody, who had been arrested and was detained upon a writ of latitat issued out of this court, and directed to the bailiff of the borough of *Southwark*, and not to the sheriff of *Surrey*, as he contended it ought to have been, upon the authority of *Grant* v. *Bagge* (*a*);

Marryatt, on shewing cause, admitted the principle of that case, that the writ must be directed to the proper

(*a*) 3 *East*, 128.; and vide *Rex* v. *Osmer*, 5 *East*, 304, and *Carrett* v. *Smallpage*, 9 *East*, 330.

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officer of this court; but ſaid that it had never yet been decided that the bailiff of *Southwark*, into whoſe liberty the ſheriff could not enter, was not the proper officer of the court for the execution of its writs within the borough. He ſaid that writs were directed from this court to the Lord Warden of the Cinque Ports. But

The Court ſaid that their officer was the ſheriff of the county, to whom their writ was, in the firſt inſtance, to be directed.

Rule abſolute.

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DENISON and Others *against* RICHARDSON.

Friday, June 28th.

THE plaintiffs declared in covenant, that by an indenture of the 25th of *August* 1810, between *Lownes* and *Bateson* of the first part, the plaintiffs of

The plaintiffs having by indenture, (to which they, and *L.* and *B.*, and the defendant, together with others, were parties,) covenanted to indemnify the Bank of *England* against the advance of 100,000*l.* to *L.* and *B.* for nine months, upon certain bills of exchange, to which the plaintiffs, as original guarantees to the Bank, had agreed to become parties by drawing, accepting, or indorsing the same; which bills were stipulated to be drawn, accepted, and indorsed for certain proportional sums, by certain of the parties, (plaintiffs,) in manner and form as agreed upon; and which were stated as intended to be drawn *at 65 days after date, or in such other manner* as should be agreed upon; and which bills might be renewed, not exceeding three renewals within the nine months; and the defendant, as a sub-guarantee (with many others, whose names were set down in a schedule, each for a certain sum,) having agreed to indemnify the plaintiffs to the extent of 2000*l.* against any loss on such bills;

Held that the plaintiffs having, on the failure of *L.* and *B.*, been obliged to pay the whole 100,000*l.*, with interest, to the Bank for its advances on all the bills, it was not necessary for them, in declaring on the covenant against the defendant, a sub-guarantee, for the amount of his particular stipulated indemnity, to specify the several *dates and times of payment, &c* of the different bills which were drawn, accepted, or indorsed by them; such discriminating particulars of the mass of bills drawn having become unnecessary in the event, inasmuch as the plaintiffs, the primary guarantees of the Bank, had been obliged to pay the whole sum for which all the bills were drawn; and consequently each sub-guarantee had become liable for the whole amount of his separate sub-indemnity. But it is sufficient to allege, generally, that the Bank had advanced and lent to *L* and *B.* the whole sum of 100,000*l.* by way of discount *on certain bills of exchange drawn, accepted, and indorsed in manner and to the respective amounts mentioned in the indenture:* that *L.* and *B.* had drawn *certain bills of exchange according to the form and effect, true intent and meaning of the indenture, to the amount of* 100,000*l.*, for the purpose of being discounted by the Bank, for the use of *L.* and *B. in the several and respective amounts mentioned in the deed*, videlicet, (stating the amount of the several bills for the proportional sums, and the names of the primary guarantees by whom they were to be drawn, accepted, or indorsed, as agreed upon;) and that before the said bills became due *L.* and *B.* became unable to pay them, and did not at any time pay them; by reason of which the plaintiffs were obliged to pay to the Bank 100,000*l.* on account of such bills, &c.; and that the defendant (and the other sub-guarantees) had not indemnified the plaintiffs.

But as the facts of such bills having been drawn and become due, (out of which arose the obligation of the plaintiffs to pay the Bank the amount of such bills, and the obligation of the defendant to indemnify the plaintiffs for his proportion of such payment,) and the fact of such payment by the plaintiffs, constitute the gist of such an action, they must be alleged with *time and place*; and therefore where it was only alleged that the Bank (after the deed of covenant,) to wit, *on the 28th of August* 1810, *at Westminster*, &c. advanced and lent to *L.* and *B.* 100,000*l.* by way of discount on certain bills of exchange, &c. (as before:) that *L.* and *B. drew certain bills of exchange*, &c. to the amount of 100,000*l.* &c. which said bills were accepted, &c.: that before the said bills became due *L.* and *B.* became unable to pay, &c.: by reason of which said premises the plaintiffs became damnified, and forced and obliged to pay, and did THEN and there necessarily pay the Bank 100,000*l.* on account of such bills, &c.: the *time* was held to be insufficiently laid: for the word *then* must refer to the 28th of *August*, the very day of the advance by the Bank upon the bills, which could not have become due till a subsequent day; and then it would negative the allegation that the plaintiffs were *forced and obliged to pay the Bank* on the same day, and make the whole repugnant and senseless: and advantage may be taken of this on special demurrer.

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the ſecond part, and certain perſons whoſe names, &c. were ſcheduled in a ſchedule annexed, (amongſt others the defendant,) of the third part; reciting that *Lowndes* and *Bateſon*, brokers at *Liverpool*, had repreſented to the other parties, that, in conſequence of recent failures in certain mercantile houſes with whom they were connected, they were unable at preſent to meet their engagements, and that their embarraſſments were only of a temporary nature, and that if they, *Lowndes* and *Bateſon*, could procure a loan of 100,000*l.* for 9 months, they ſhould be able to re-pay it with intereſt, and retrieve their affairs, and proceed with their buſineſs: and alſo reciting that *Lowndes* and *Bateſon* had applied to the Bank of *England* to lend them 100,000*l.*, which the Bank had agreed to do, *by way of diſcount of certain bills of exchange to be reſpectively drawn, or accepted, or indorſed, reſpectively* by the ſaid parties of the ſecond part, in manner *and to the reſpective amounts therein-aftermentioned*: and alſo reciting that the plaintiffs, on application of *Lowndes* and *Bateſon had agreed to draw, accept, indorſe, or otherwiſe become parties to bills of exchange to the amount of* 100,000l., *with intereſt, for the purpoſe of the ſame bills of exchange being diſcounted by the Bank of* England *for the uſe of* Lowndes *and* Bateſon *in the following reſpective amounts*, that is to ſay, (and then it apportioned the ſums for which the different plaintiffs, being the repreſentatives of ſix ſeveral houſes, were amongſt themſelves to lend their names upon the bills, amounting to the 100,000*l.*:) and alſo reciting that ſuch advances were agreed to be made in bills as follows; that is to ſay, the ſum of 15,000*l.* in a bill or bills to be drawn by *Lowndes* and *Bateſon* on the ſaid *D. Rainier, H. Ballard*, and *J. Morgan* (being one of the houſes repreſented by the

 plaintiffs)

plaintiffs) by their aforesaid firm, and made payable to, or to the order of the said *J. Denison*, *T. Shepherd*, and *T. Wilkinson*, (another house represented by the plaintiffs,) under their aforesaid firm; (and so it proceeded in like form and manner to specify the amount of the several other bills agreed to be drawn, accepted, or indorsed by the respective houses, represented by the plaintiffs, to the amount of the 100,000*l.* stipulated to be advanced;) *and which several bills of exchange were intended to be drawn and made payable at 65 days after date, or in such other way or form* as such bills, for such advances, should be drawn, accepted, or indorsed by the parties of the first and second part, or any of them, or as might thereafter be agreed upon between *Lowndes* and *Bateson* and the plaintiffs; *and which bills might from time to time be renewed*, not exceeding three renewals thereof as aforesaid; and that the plaintiffs had agreed to enter into such engagements by means of such bills of exchange upon the express agreement, condition, and stipulation, that they should be *indemnified and saved harmless by the parties of the third part* (including the defendant): and also reciting that the parties of the third part had accordingly agreed so to indemnify the plaintiffs *in the proportion*, and in the manner thereinafter-mentioned: the indenture witnessed that the parties of the third part *severally* (but not jointly) covenanted with the plaintiffs *to indemnify* them against all payments, losses, claims, and demands, which might be made against the plaintiffs, or any of them, by the Bank of *England*, or by any person, on account of the said several bills of exchange, amounting in the whole to 100,000*l.* and interest, so to be drawn, accepted, or indorsed, by or to which the plaintiffs should or might be in any wise parties as aforesaid, and so to be discounted

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by the Bank of *England* as aforesaid, and against all actions, &c, to be prosecuted against the plaintiffs upon or on account of the said bills of exchange; with a *proviso* that the parties of the the third part (including the defendant) *should only be liable severally for the respective sums set opposite their names.* Then the plaintiffs averred that the defendant was one of the parties of the third part named in the schedule, &c. annexed to the indenture; and that 2000*l.* was set opposite to his name. That the Bank of *England afterwards, to wit, on the* 28*th of* August 1810, at *Westminster*, &c. advanced and lent to *Lowndes* and *Bateson* the sum of 100,000*l.*, in the indenture mentioned, by way of discount of *certain bills of exchange*, drawn, accepted, and indorsed *in manner and to the respective amounts herein-beforementioned.* That *Lowndes* and *Bateson drew certain bills of exchange* according to the form and effect, true intent and meaning of the said indenture, to the amount of 100,000*l.*, for the purpose of their being discounted by the Bank of *England* for the use of *Lowndes* and *Bateson*, in the several and respective amounts before mentioned; *which said bills were accepted and indorsed according to the form and effect, true intent and meaning of the said indenture;* that is to say, a certain bill of exchange, &c. drawn by the said *J. Lowndes* and *J. Bateson* on the said *W. J. Denison*, *T. Shepherd*, and *T. Wilkinson*, (represented by the plaintiffs) for 12000*l.*, payable to the order of *Gedeon*, *Acland*, and Co., and a certain other bill, &c. (and so it proceeded to describe, in like general form and manner, the amounts of the several bills drawn, and the parties thereto, in the same terms in which they were before described.) That before the said bills became due *Lowndes* and *Bateson* became and were unable to pay the same, and did

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not at any time pay the money due on ſuch bills; *by reaſon of which ſaid premiſes* the plaintiffs became damnified, *and forced and obliged to pay, and did* THEN *and there neceſſarily* pay to the Bank of *England* 100,000*l.* on account of *ſuch bills of exchange, ſo drawn, accepted, and indorſed as aforeſaid*, to wit, at *W.*, &c. The plaintiffs then averred that the parties to the indenture of the third part had not indemnified them againſt the payments and demands, &c. made againſt the plaintiffs by the Bank, on account of the ſaid ſeveral bills of exchange, ſo drawn, accepted, and indorſed, and diſcounted by the Bank as aforeſaid, but had refuſed ſo to do; of which the defendant had notice. And then the plaintiffs averred that though they had performed the covenants on their part, the defendant had not indemnified them againſt all payments, loſſes, claims, and demands upon them on account of the ſaid ſeveral bills of exchange ſo drawn, accepted, and indorſed as aforeſaid, and to which the plaintiffs were parties as aforeſaid; nor had the defendant, ſo being one of the parties to the ſaid indenture of the third part as aforeſaid, paid the ſaid 2000*l.* ſo ſet oppoſite to his name as aforeſaid, but to pay the ſame, though requeſted, had refuſed; contrary to the tenor and effect, &c. of the ſaid indenture, to wit, at *W.*, &c. There was another count, in ſubſtance the ſame. The defendant demanded oyer of the indenture, which was given, and then demurred, and aſſigned theſe ſpecial cauſes of demurrer.

Special cauſes of demurrer.

1ſt. That the dates and other particulars of the ſaid bills of exchange mentioned to have been drawn by *Lowndes* and *Bateſon* to the amount of 100,000*l.* are not ſet forth, and the defendant is not informed what bills in particular are meant or alluded to, againſt which the parties to the ſaid indenture of the third part, or the

 defendant,

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defendant, hath not indemnified the plaintiffs. And though it appears by the said indenture that the bills against which the parties of the third part were to indemnify the plaintiffs might from time to time be renewed, not exceeding three renewals thereof; yet it does not appear whether the bills, which the plaintiffs alleged they have been obliged to pay to the Bank of *England*, were the first set of bills which *Lowndes* and *Bateson* were authorized by the indenture to draw, or whether they were bills drawn under the powers of renewal contained in the indenture, and whether they were drawn under the first, second, or third renewal: for want of which information the defendant cannot tender any issue whether *Lowndes* and *Bateson* have paid the said bills, or otherwise provided for them, or not; nor can the defendant shew in what manner either the parties to the indenture of the third part in general, or the defendant in particular, have indemnified the plaintiffs against the payments, losses, and claims made against them by the Bank of *England*. And also, 2dly, for that the indenture provides that the bills for 100,000*l.*, to be drawn by *Lowndes* and *Bateson*, were to be drawn at 65 days date, or in such other way or form as such bills for such advances should be drawn, accepted, or indorsed by the parties of the first and second part, or as might thereafter be agreed upon between *Lowndes* and *Bateson*, and the parties of the second part; yet it does not appear whether the said bills stated to be so drawn by *Lowndes* and *Bateson* were drawn at 65 days date, or that *Lowndes* and *Bateson*, and the said parties of the second part, had agreed upon any other date at which the said bills were to be drawn, or had agreed upon any other manner for drawing them; so

as to shew in what certain manner the said bills were drawn, or whether they were drawn according to the form and intent of the indenture. And 3dly, for that it does not appear that the said bills in the indenture, alleged to have been drawn by *Lowndes* and *Bateson* to the amount of 100,000*l.*, for the purpose of being discounted by the Bank of *England*, were in fact discounted by or delivered to the Bank, or that the Bank ever advanced money to *Lowndes* and *Bateson* on the bills in the declaration alleged to have been drawn to that amount. And also, 4thly, for that it does not appear by the declaration that when the said bills therein stated to be so drawn became due, any demand for payment was made by the holders thereof upon the drawers, or upon *Lowndes* and *Bateson*. And also, 5thly, for that it does not appear how or for what reason the plaintiffs were obliged to pay the sum of 100,000*l.* on account of the said bills mentioned in the declaration to have been drawn by *Lowndes* and *Bateson*, inasmuch as it does not appear that the plaintiffs ever accepted the said bills; and in case they had accepted them, they were liable, in the first instance, to pay the amount of them, as acceptors, to the holders thereof, and could not be liable by reason of any default in *Lowndes* and *Bateson*, who were themselves only liable in default of the drawers. And also, 6thly, for that it does not appear that the several sums paid by the plaintiffs to the Bank of *England* were paid upon any bills upon which the Bank had advanced any money. And, 7thly, for that there is *no time stated* when, nor any place or venue stated where *Lowndes* and *Bateson* drew the said bills alleged to have been drawn by them to the amount of 100,000*l.* And there is no proper time stated when the plaintiffs paid the said

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100,000*l.* to the Bank: and though it is alleged that the plaintiffs *then* paid the faid fum; yet as the word *then* muft be referred to the laft antecedent in time, and the laft antecedent in time is the time when the Bank is alleged to have advanced to *Lowndes* and *Batefon* the faid 100,000*l.*, the allegation of time is repugnant and inconfiftent, &c.

The Court, after hearing *J. Clarke* in fupport of thefe feveral caufes of demurrer, and *Taddy*, contrà, overruled all the objections, except as to the want of alleging time and place to the drawing of the bills, and their payment by the plaintiffs when due. As to the other objections, they faid that the precife amount agreed upon having been advanced by the Bank on difcount of *Lowndes* and *Batefon*'s bills, and the precife amount of fuch advance paid by the plaintiffs, it was immaterial what the dates of the bills were: however, it might have been neceffary, if the plaintiffs had only taken up and paid part of the bills drawn, to have fpecified thofe which they had fo paid. And next they thought that it did fufficiently appear that the bills which *Lowndes* and *Batefon* had drawn were thofe which the Bank had difcounted, and which the plaintiffs had taken up and paid: that they were not to prefume, as it was not fo ftated, that the bills originally drawn by *Lowndes* and *Batefon* had been renewed; but that if they had, which was warranted by the deed, it was in fubftance and effect the fame thing, if the firft fet of bills had been difcounted by the Bank, and the plaintiffs had been at laft obliged to take up and fatisfy the renewed bills which had been given in lieu of the firft fet. In anfwer to another objection, that the bills were not fhewn to have been

drawn

drawn within 65 days date, or in what other manner agreed upon between *Lowndes* and *Bateſon* and the plaintiffs; and that as againſt the defendant, who was only a ſurety, it was neceſſary to ſhew preciſely that the bills were drawn according to the power: *The Court* further ſaid that it was quite immaterial, as the bills might be drawn in the alternative at 65 days, or in ſuch other way or form as they ſhould be drawn, &c. to ſhew which way they were drawn: the omitting to ſtate it was only avoiding a frivolous particularity, which the caſe in the event did not require: and it was alleged generally that the bills were drawn according to the form and effect, true intent and meaning of the indenture, which was ſufficient, where, in the event, there was no neceſſity for particularizing and diſtinguiſhing them.

But with reſpect to the want of allegation of time and place, *Js. Clarke* contended that the payment of the bills by the plaintiffs, being the foundation and gift of the action, ought to be alleged with time and place, according to the rule given in 5 *Com. Dig.* Pleader, (C) 19. That the allegation, that the plaintiffs were *then* and there obliged to pay to the Bank 100,000*l.* on account of ſuch bills, muſt refer to the only antecedent of time mentioned, namely, the 28th of *Auguſt* 1810, when the bills were drawn, and the money advanced on them by the Bank; which makes it repugnant and ſenſeleſs: for the defendant, who was to indemnify the plaintiffs for his proportion againſt the default of *Lowndes* and *Bateſon*, the drawers or acceptors, could not become liable on the very day the bills were drawn. [*Le Blanc* J. That would be before the bills became due.] A repugnant date is never aided unleſs after verdict.

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Taddy, contrà, argued that the allegation of time, as to the payment of the bills by the plaintiffs, was unnecessary in covenant, where it is sufficient to set out the covenant and the breach of it; and the mode of damnification need not be stated with particularity. [Lord *Ellenborough* C. J. The plaintiffs have properly set out their damnification; but the only question is whether, as it is here set out, that they "*then* and there" necessarily paid so much to the Bank, that must not be taken to refer to the day of the advance, the last antecedent of time: but the plaintiffs could not *necessarily* be forced to pay the bills of exchange on the very day when the money was advanced on such bills. *Bayley* J. If the plaintiffs voluntarily incurred a damnification they could not recover upon it.] Supposing the words "*then* and there" to refer to the date of the advance, it could not constitute a defence to this action for an indemnity, that the plaintiffs had paid the Bank before the day that they were obliged to do so; this action against the surety not having been brought till after the bills had become due and the principals had been damnified. [*Bayley* J. But still it does not support the plaintiffs' allegation, that they were *then*, i. e. on the 28th of *August* 1810, necessarily obliged to pay the Bank.]

Lord ELLENBOROUGH C. J. The plaintiffs cannot support their allegation, that by reason of the premises they were *forced and obliged* to pay, and did *then* and there *necessarily* pay the Bank their advance on the bills, when it appears by reference to the only antecedent of time mentioned, that this was on the very day of the advance on the bills, and that the plaintiffs must have paid it *voluntarily*. I was considering whether the words, "did *then and there* necessarily pay," might not be referred to the

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the time and place when and where the plaintiffs were forced and obliged to pay the money; but still there would want an allegation of time and place when and where they were forced and obliged to pay. All this waste of paper, time, and expence might have been saved by the addition of a few words as to time and place.

The Court then, on the application of the plaintiffs' counsel, gave leave to amend, on payment of costs.

BATEMAN *against* SMITH.

Friday, June 28th.

If the plaintiffs sue in a superior court for a demand of above 40*s.*, which at the trial is cut down below that sum by the defence of infancy; and the jury thereupon *find the damages for the plaintiff under* 40*s.*; the defendant, residing in *Middlesex* at the time of the action brought, and liable to be summoned to the county court there, is entitled, under the stat. 23 *G.* 2. *c.* 33. *s.* 19, to enter a suggestion on the roll to that effect, entitling him to double costs of suit.

THE plaintiff brought assumpsit against the defendant to recover 3*l.* 15*s.* 4*d.*, which was partly for beer sold and delivered, and partly for money lent to the defendant. The latter pleaded the general issue, and set up the defence of infancy at the trial. The plaintiff contended that the debt was for necessaries: but Lord *Ellenborough* C. J. at the sittings at *Westminster*, over-ruled the demand for the money lent, as for necessaries; and under his Lordship's direction, the jury only allowed part of the plaintiff's demand for the beer, to the amount of 1*l.* 13*s.*, for which they gave their verdict. Whereupon a rule nisi was obtained by *Park* on a former day, for entering a suggestion on the plea-roll, that the defendant was an inhabitant of and residing in *Middlesex* at the time of the action commenced, in order to entitle her to double costs upon the *Middlesex* county court act, 23 *G.* 2. *c.* 33. *s.* 19.

Garrow and *Lawes* now opposed the rule, and contended that the case was not within the statute, as the law

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law allowed in the first instance of a debt contracted by an infant, though the infant might afterwards avoid it at her election: but till the trial it could not be told that the defendant, who had only pleaded the general issue, would set up the defence of her infancy to avoid it: and here the original debt was above 40*s.* and therefore not within the meaning of the act. In like manner as a debt reduced by a set-off below 40*s.* has been held not to be within the act (*a*). But

Lord ELLENBOROUGH C. J. said, that it was assuming the whole question here to say, that the original debt was above 40*s.*; for the jury had found the damages to be under 40*s.*; which entitles the defendant to recover double costs by the very words of the act under consideration.

Per Curiam, Rule absolute.

(*a*) Vide *M'Collum* v. *Carr*, 1 *Bos. & Pull.* 223. But see *Clarke* v. *Askew*, 8 *East*, 28., where that case was doubted, and a debt reduced below 40*s.* by part payment before action brought, was held to be within the *Southwark* Court of Requests act. And the like construction was put upon the *London* Court of Requests act in *Horn* v. *Hughes*, *ib.* 347.

Friday, June 28th.

LEGATT *against* TOLLERVEY.

If the plaintiff in an action for a malicious prosecution offer to prove at the trial the original record of the indictment and acquittal or a true copy thereof, such evidence must be received, though there were no order of the Court or fiat of the Attorney-General allowing the plaintiff a copy of such record: but the officer who, without such authority, produces the record or gives a copy of it to the party, is answerable for the contempt of Court in so doing; and the Judge at nisi prius would not compel him to produce the record in evidence, without such authority.

THIS was an action on the case for a malicious prosecution of the plaintiff by the defendant for a felony; and at the trial before *Heath* J. in *Sussex*, it was stated by the plaintiff's counsel in opening his case, that a

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bill of indictment for a felony had been preferred by the defendant against the plaintiff at the Quarter Sessions of the peace for the county of *Sussex*, on which the plaintiff was tried and acquitted; and then another bill was preferred for the same offence, which the grand jury did not find: and the plaintiff afterwards called an officer of that court as a witness, who produced the indictments: but as it did not appear that either the Court of Quarter Sessions or the Attorney-General had authorized a copy of either of the indictments to be given to the plaintiff, the learned Judge would not suffer either to be proved, and nonsuited the plaintiff; relying on the authority of a case of *Evans* v. *Philips* (a), at *Monmouth* summer assizes 1763, in which Mr. Baron *Adams* declared that he should look on the copy of an indictment as surreptitiously taken, and not to be regarded, unless the Court had been applied to and had ordered such copy. That if the plaintiff had a right to a copy of the indictment, the usual application to the Court or to the Attorney-General was unnecessary: if the plaintiff had no such right, it should not be left to the discretion of the officer of the court, whether or not the action might be brought. A motion was made for setting aside the nonsuit, on the ground that the want of an order from the Court for a copy of the indictment was not necessary to found the plaintiff's right of action, whatever difficulty he might be under in obtaining the necessary proof of his case without the aid of such an order; and a rule nisi having been granted;

Best, Serjt., *D'Oyley*, and *Roe* now opposed the rule, and insisted that, as the officer who produced the records from the Sessions had no authority from that Court, nor

(a) Reported from a MS. in *Selwyn's Ni. Pri* 944.

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any fiat from the Attorney-General for that purpofe, it was a wrongful act and breach of his duty, and therefore the evidence was properly rejected. They referred to the general order made by the judges at the *Old Bailey* in the 16 *Car.* 2. (*b*), (inter alia,) " 7. That no copies of any indictment for felony be given without fpecial order, upon motion made in open court, at the general gaol delivery; for the late frequency of actions againft profecutors, (which cannot be without copies of the indictments,) deterreth people from profecuting for the king upon juft occafion:" which order, they obferved, had been conftantly acted upon ever fince, and was confidered by Mr. Baron *Adams* in the cafe cited, and by the learned Judge before whom this caufe was brought, as warranting the exclufion of any other evidence of the indictment than the record, or an examined copy of it obtained under fuch an order. They alfo infifted upon the inconvenience of a contrary practice, which is adverted to in the order itfelf. [*Le Blanc* J. obferved, that if the officer of the Court of Quarter Seffions had applied to the judge at nifi prius, and ftated that he was there ready to produce the records, but had no order of the Court to do fo, there is no doubt that the judge would have told him, that he was not bound to produce them on the mere application of the party. But it is a different queftion whether, if offered to be produced in evidence, fuch evidence was properly rejected for want of an order.

Shepherd Serjt. and *Courthope*, in fupport of the rule, infifted upon the admiffibility of the records in evidence when ready to be produced; though the officer, without an order for the purpofe, might not have been compellable

(*b*) This is ftated at the beginning of *Kelyng's Reports*, (p. 3.)

pellable to produce them upon an ordinary ſubpœna duces tecum. The order can never be neceſſary to make the record or an examined copy evidence, which is evidence per ſe, and the only evidence of the allegation of the prior indictment; though, without it, the Court would neither compel the officer, if preſent, to produce it, or attach him for not obeying the ſubpœna. They denied the authority of the caſe before Mr. Baron *Adams*; and referred to *Jordan* v. *Lewis* (a), as giving the

(a) 2 *Stra.* 1122. The following is a more correct note of that caſe, from Mr. *Ford*'s MS.

Jordan v. *Lewis*, *H.* 13 *Geo.* 2. *B. R.*—"The plaintiff and one *Stebbing* were indicted at the *Old Bailey* for forging a promiſſory note, and acquitted; and the Court ordered *Stebbing* only to have a copy of his indictment; but *Jordan*, having alſo procured a copy of the indictment and acquittal, brought an action againſt the defendant for a malicious proſecution; and this copy was produced in evidence, &c. It was objected that the copy ought not to be received, becauſe the judge had refuſed to grant *Jordan* a copy of the indictment; and the order that had been made for that purpoſe at the *Old Bailey* was produced. But *Lee* C. J. who tried the cauſe, allowed this copy to be given in evidence; and the proſecution appearing to be malicious, the plaintiff recovered 200*l.* damages; but the Chief Juſtice gave the defendant leave to move for a new trial. And now

Sir *Thos. Abney* and others moved for a new trial, and that the plaintiff might anſwer the matters of an affidavit, reciting the whole circumſtances of the caſe, and charging him with procuring the copy of the indictment contrary to the expreſs directions of the Court.

Sed per Curiam. This being a copy of the indictment, the Court could not refuſe receiving it in evidence; nor could the Court take notice in what manner it was obtained. It was likewiſe held that to procure a copy, &c., contrary to the directions of the *Old Bailey*, could not be conſidered as a contempt (1) of the Court; and therefore the motion was denied. But the Chief Juſtice ſaid that if the defendant had applied ſooner, when this action was firſt brought, the Court would have ſtaid proceedings. And *Chapple* J. ſaid that the defendant might have an action againſt the officer for giving the plaintiff a copy of the record; for he ought not to have drawn up the copy, &c. that was granted to *Steb-*

(1) This muſt be underſtood as applied to the plaintiff in the action, and not to the officer of the Court.

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the better rule; where Lord C. J. *Lee*, in an action for a malicious prosecution, held himself bound to receive in evidence a copy of the indictment, without any order for allowing such copy to the plaintiff: and the plaintiff having obtained a verdict, this Court afterwards refused to set it aside.

Lord Ellenborough C. J. It is very clear that it is the duty of the officer, charged with the custody of the records of the court, not to produce a record but upon competent authority, which at the *Old Bailey* is obtained upon application to the Court, pursuant to the order which has long prevailed there; and with respect to the general records of the realm, upon application to the Attorney-General. But if the officer shall, even without authority, have given a copy of a record, or produce the original, and that is properly proved in evidence, I cannot say that such evidence shall not be received. He may incur the penalty of his contempt of the Court, and he may be warned at the time of his peril in so doing: and a discreet officer placed in such a situation would, doubtless, before he produced the record, or gave a copy of it, apply to the Court, and state the circumstances of the case; and it cannot be doubted that he would be saved harmless in doing what, after such disclosure, the Court should order him to do. But still I cannot help

bing, as if both defendants had been acquitted; but only that *Stebbing*, who had a copy, &c. allowed him, was acquitted. And he said that he had known that done. Sed tamen quære; for the record is entire."

In Mr. Justice *Clive's* note of the same case it is said to have been "doubted by the Court, whether the defendant could not maintain an action on the case against the officer who had granted a copy of the indictment contrary to the orders of the Court." However that might be, it seems that such conduct in an officer would be a high contempt of the Court, and punishable accordingly.

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thinking, that the rule laid down by Lord C. J. *Lee*, in the cafe of *Jordan* v. *Lewis*, is the correct one. The order made at the *Old Bailey* was there read by way of objection to the evidence offered: but the Chief Juftice faid that he could not refufe to let the plaintiff read the copy of the indictment, though obtained without any order of the Court for the purpofe. If the production of fuch an order were effential to the validity of the evidence, then if the evidence of the record of acquittal on the former profecution, or a true copy of it, were found as a fact in a fpecial verdict, it would be immaterial, unlefs the order of the judge or Court before whom it was tried, allowing it, were alfo proved and found. But can this be ftated? Even if it were found negatively that the Judge or Court had refufed to allow the party acquitted a copy of the indictment; yet if, in the fubfequent action for a malicious profecution, the plaintiff gave in evidence that which he was able to prove to be in fact a true copy of the indictment, can it be faid that it would not be available? With deference, then, to the opinion expreffed by Mr. Baron *Adams* in the cafe cited, by which alone the opinion of the learned Judge appears to have been governed on the trial of this caufe, I do not fee how the circumftance of the copy, if the witnefs proved it to be a true copy of the record, having been, as he fays, furreptitioufly taken, can affect the validity of the proof; though the officer's conduct in lending himfelf as a voluntary inftrument to the plaintiff's purpofe, might properly be animadverted upon by the Court. The order made at the *Old Bailey* does not ftate that actions againft profecutors cannot be maintained without an order firft obtained for a copy of

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the indictment, but only that they cannot be maintained without copies.

The other judges assenting, the rule for setting aside the nonsuit was made absolute.

Friday, June 28th.

STOVELD *against* HUGHES and Another.

The defendants having sold a quantity of timber, then lying at their own wharf, to *D.*, for bills payable at a future day, which timber was then marked by *D.*, and a small part of it was forwarded by the defendants to one place, and part to another, and then *D.*, before the time of payment arrived, sold the whole to the plaintiff, who notified such sale to the defendants, and was answered that it was *very well*, and then in the presence of the defendants the plaintiff marked all the timber lying at their wharf, and afterwards marked that which had been forwarded to the other two stages: held that the defendants, after such assent to the transfer, and such marking by the plaintiff, could not retain or stop any of the timber, as in transitu, upon the subsequent insolvency, before the day of payment, of *D.*, the original vendee, to whom payment had been made by the plaintiff, whatever question there might have been as between the original vendors and vendee.

IN trover for timber, which was tried before the Lord Chief Baron in *Sussex*, in the summer of 1810, it appeared that the timber was originally the property of the defendants, and was lying at their wharf at *Moat Bridge* on the 25th of *November* 1809, when it was sold by them to *W.* and *H. Dixon*, and was thereupon jointly marked by the servants and agent of the defendants and the *Dixons* with the letters *W. H. D.* and with a private mark of the latter, in the presence of the defendants, who then said that they would send the timber to *Shoreham*. The price to be paid by the *Dixons* was 1027*l.* and their agent gave the defendants bills to that amount at the usual credit, in this trade, of three months. A small quantity of the timber was soon afterwards forwarded by the defendants to *Ægypt* wharf, (which is a stage for delivery when it is to be carried to *London*,) and another small quantity was forwarded by them to

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Shoreham wharf. The reſt remained at *Moat Bridge* wharf, and was ſold ſome time early in *December* by the *Dixons* to the plaintiff, who paid them for the ſame. Between the 16th and 29th of *December*, (for the witneſſes differed as to the day,) *Wilkinſon*, the plaintiff's agent, came to *Moat Bridge* wharf, with a notice from the *Dixons* to deliver the timber to the plaintiff. *Wilkinſon* there ſaw *Hughes*, one of the defendants, whom he informed that the plaintiff had bought the timber of the *Dixons*; to which *Hughes* anſwered, that *it was very well*, and that he would go out with him and ſhow him the timber: they accordingly went on the wharf, where *Wilkinſon* found the timber before marked by the *Dixons*, on which he put the further mark of *W. S.* the plaintiff's initials; and ſome of the timber was thus marked in the preſence of the defendant *Hughes*. *Wilkinſon* then told *Hughes* to ſend no more of the timber to the *Dixons*, to which *Hughes* made no objection. The timber was not proved to have been meaſured on the part of the plaintiff, but he had given *Wilkinſon* an account of it, which *Hughes* compared with his own account of it, and it was found that they agreed. It appeared further, that the *Dixons* were ſuſpected by the plaintiff to be in a failing condition early in the month of *December*; and on the 4th of *January* 1810 *Hughes* ſaid to the plaintiff, that the time of payment (meaning of the *Dixons'* bills to the defendants for the price of the timber,) was coming round, and that he muſt ſee the *Dixons* upon it; otherwiſe he muſt come to the plaintiff, as he underſtood that he had bought it: on which the plaintiff told *Hughes* that he had ſettled with the *Dixons*, who had got bills for the amount; and that he was apprehenſive the defendants would not be paid. The defendant's

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ants' bills from the *Dixons* were in fact dishonored, and the defendants claimed to stop in transitu as well the timber which had been sent forward to *Ægypt* and *Shoreham* wharfs, which he had given notice to the respective wharfingers not to deliver to the plaintiff, as that part which still remained at *Moat Bridge* wharf; the whole of which timber at each place had been sold by the *Dixons* to the plaintiff, and marked by him in the manner before stated. A formal demand of the timber was made by the plaintiff on the defendants at *Moat Bridge* wharf on the 5th of *March*, who refused to deliver it; and on the 5th of *April* another demand was made of them to draw down the remainder of the timber to the barges, when an offer was made to pay the wharfage, if any were due; but the defendant *Hughes* said that no wharfage was due, and refused to part with it. The wharfingers of *Ægypt* and *Shoreham* wharfs proved that parts of the timber had been delivered there by the defendants on account of the *Dixons*; but the plaintiff's mark was on it as well as that of the *Dixons*: and the *Shoreham* wharfinger afterwards used some of it by the permission of the plaintiff, and was to pay him for it: but he had before had the leave also of the *Dixons* to use some part, and they had told him that they should send for the rest to forward it to *London*. The wharfingers afterwards received notice from the defendants not to deliver it.

The question made at the trial upon the whole of the evidence was whether there was such a delivery of the timber by the defendants to the *Dixons*, as would prevent the defendants from stopping it in transitu against the vendee of the *Dixons*; and a verdict passed for the plaintiff, by the direction of the Lord

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Chief Baron, for 1027*l.*, the value of the timber; his Lordſhip relying principally on the part-delivery (*a*) of the timber which had been made by the defendants on account of the *Dixons* at *Ægypt* and *Shoreham* wharfs; and on the notice to the defendants of the ſale by the *Dixons* to the plaintiff, to which the defendants had made no objection: and conſidering the contract to be entire, and the bills received by the defendants from the *Dixons* to have been received for the whole; that the poſſeſſion of a part by the *Dixons* under that entire contract and payment, and the implied aſſent of the defendants to the ſale made by the *Dixons* to the plaintiff, bound the defendants to deliver the remainder of the timber to the vendee of the *Dixons*; although the greater part of it ſtill remained on the wharf of the defendants, and the *Dixons'* bills had ultimately been diſhonored.

A new trial was moved for in laſt *Michaelmas* term, when the Court recommended, if the parties could agree upon the facts, to ſtate them in a ſpecial caſe; but this not having been ſettled, the queſtion before made, as to the defendants' right to ſtop the goods in tranſitu, now came on to be argued upon the judge's report.

Garrow and *D'Oyley* ſhewed cauſe againſt the rule, and contended that the circumſtances of the caſe ſhewed an actual delivery of the timber by the defendants to the *Dixons*, the original vendees, in the firſt inſtance, and afterwards to the plaintiff, the ſub-vendee; either of which would be ſufficient to ſuſtain the action: and that

(*a*) Vide *Slubey* v. *Heyward*, 2 *H. Blac.* 504, and *Hammond* v. *Anderſon*, 1 *New Rep.* 69. But ſee alſo *Hanſon* v. *Meyer*, 6 *Eaſt*, 626. on this doctrine.

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the defendants, after ſuch actual delivery, had no lien on the timber for the price, nor any right to ſtop in tranſitu. After the ſale to the *Dixons*, the timber was taken poſſeſſion of by them, through the agency of their ſervants, who, in the preſence and with the aſſiſtance of the defendants' ſervants, put the marks of the *Dixons* upon the pieces; which was as complete a delivery by the vendors, and a taking poſſeſſion by the vendees, as the ſubject-matter, a bulky commodity, would admit of. A part of it was afterwards forwarded to *Shoreham*, the original intended place of deſtination, and another part to *Ægypt* wharf, by the orders of the *Dixons*, dealing with it as their own; having before given bills for the whole at the uſual credit. But further, the vendees dealt with it as their own, by making a ſale of it to the plaintiff, the ſub-vendee; and this with the knowledge of the vendors, and without objection by them. This brings it within the caſe of *Chaplin* v. *Rogers* (*a*), where after a bargain and ſale of a ſtack of hay between the parties on the ſpot, the vendee having ſold a part of it to another, who took ſuch part away, was held to be evidence of ſuch an actual poſſeſſion taken of the commodity by the original vendee of the whole, thus acting with it as his own upon the delivery of the original vendor, as to take the caſe out of the ſtatute of frauds. [Lord *Ellenborough* C. J. The change of mark from *A.* to *B.* on bales of goods in a warehouſe, by the direction of the parties, was clearly held by the Houſe of Lords, in a late caſe, to operate as an actual delivery of the goods; and this, after three days argument at their bar: though I own it appeared to me that the caſe only re-

(*a*) 1 *Eaſt*, 192.

quired

quired to be ftated in order to be difpofed of at once.] Here too the plaintiff's agent, after the fale to him was made known to the defendants, put his mark upon the timber in the prefence of one of the defendants, without any objection made by him at the time. They alfo referred to *Hodgfon* v. *Le Bret* (*a*), and *Anderfon* v. *Scott* (*b*) at the fittings before Lord *Ellenborough* C. J.; where the marking of goods by purchafers, at the time of the contract between the parties, was held to be a delivery and taking poffeffion by the vendees, fo as to take the cafe out of the ftatute of frauds; though in fact the goods remained for fome time afterwards under the care of the vendors. [Lord *Ellenborough* C. J. I prefume that the cafes of *Hodgfon* v. *Loy* (*c*), and *Hanfon* v. *Meyer* (*d*), will be cited by the defendant's counfel to fhew that a part-payment for, or part-delivery of goods, will not deveft the vendor's right to ftop in tranfitu or their lien on the remainder: but in the one, there was no poffeffion taken by the vendee; and in the other, fomething more remained to be done before the contract was complete.] In *Slubey* v. *Hayward* (*e*), a part-delivery to the fub-vendee under a bill of lading, upon the arrival of the fhip, was held to put an end to the tranfitus, as equivalent to a taking poffeffion of the whole by fuch fub-vendee. And this cafe is alfo governed by *Ellis* v. *Hunt* (*f*), where the affignee of the vendee putting his mark on the goods, while they were at the inn in their way to the vendee, was held to be a taking poffeffion by the affignee, which prevented any fubfequent ftopping in tranfitu.

(*a*) 1 *Campb. N. P. Caf.* 233. (*b*) Cited *ib.* 235.
(*c*) 7 *Term Rep.* 440. (*d*) 6 *Eaft*, 614.
(*e*) 2 *H. Blac.* 504.; and vide *Hammond* v. *Anderfon*, 1 *New Rep.* 69.
(*f*) 3 *Term Rep.* 464.

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Marryat, contrà, contended, that the cases which had been determined upon the statute of frauds, where the only question was whether there had been a binding contract of sale, did not conclude the right of stopping in transitu; which, admitting the contract of sale in the first instance, gave the vendor an equitable right to repossess himself of the goods, upon the insolvency of the original vendee, at any time after the goods were in fact out of his possession in their way to the vendee, and before the vendee had actually or constructively taken a possession of them exclusive of the vendor. In *Ellis* v. *Hunt*, and most of the other cases where a constructive possession had been taken by the vendee or his representative, the goods had been put in transitu by the vendor, and were in the actual possession of carriers and other middle persons, who might be considered as the common agents of both parties: the goods had also arrived at the end of their journey: but here the greater part of the timber continued unpaid for in the hands of the original vendors, upon the credit of the original vendees; and therefore, upon their insolvency, the vendors had a right to retain so much of the timber as remained in their possession, and to stop in transitu that which was in the progress of actual delivery to the vendees, but had not reached its ultimate destination. After a contract of sale, the right of retaining or of stopping in transitu only arises upon the insolvency of the original vendees; and no transfer of their right to another, while the contract is still executory, and before the vendees or their assigns have obtained a possession of the goods distinct from and exclusive of the possession of the vendors and of the middle-men employed in the transit, can prevent the vendors from retaining or repossessing themselves of the goods in their

their own poſſeſſion or in tranſitu. While the goods are in the hands of middle-men, as carriers, wharfingers, warehouſemen, and the like, an order to them from the vendors, to deliver to the vendees, is an executed delivery, and puts an end to the tranſit as between thoſe parties. So where the ſubject-matter of ſale was one entire thing, the diſpoſal by the vendee of any part of that thing, and a ſeparation of ſuch part from the remainder, ſhewed a diſtinct and excluſive poſſeſſion in fact of the property by the vendee thus dealing with it, becauſe he could not have poſſeſſed himſelf of a part without taking poſſeſſion of the entire ſubject-matter. But all thoſe caſes are diſtinguiſhable from the preſent. Here the ſubject-matter of the contract was diviſible in its nature, and was in fact divided at the time of the ſub-ſale to the plaintiff; for before that time a part of the timber had been ſent off by the defendants to *Shoreham*, the firſt intended place of deſtination for the whole; and another ſmall part to *Ægypt* wharf, which appeared to have been deſtined to *London*. Then with reſpect to the ſuppoſed aſſent of the defendants to the ſub-ſale to the plaintiff from the *Dixons*; the firſt notification of the transfer was made to the defendants between the 16th and 29th of *December*, which was before the known inſolvency of the *Dixons*, and therefore the defendants then had no right to interfere, either to prevent the marking of the pieces by the plaintiff's agent, or even to his taking them away, and thus making it an executed delivery. One of the defendants, therefore, ſaying that *it was very well*, could not affect their legal or equitable rights in the event which afterwards happened, and out of which their right to ſtop the goods aroſe. They had done no act to induce the plaintiff to

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purchafe from the *Dixons*, nor were they parties to the tranfaction. The defendants might reafonably fuppofe, as nothing was faid to the contrary at that time, that the plaintiff had purchafed of the *Dixons* upon the ufual credit; and therefore there was nothing to call upon the defendant *Hughes* to give any other anfwer than what he did; it not being then afcertained that the *Dixons'* bills would not be paid: it was not till the 4th of *January* that the plaintiff difclofed to the defendants that he had already paid for the timber.

Lord ELLENBOROUGH C. J. The defendants were the only perfons who could contravene the fale and delivery to the plaintiff from the *Dixons*; and when that fale was made known to the defendant *Hughes*, before the 29th of *December*, he affented to it, by faying *very well*, and to the marking of the timber by the plaintiff's agent, which took place at the fame time. If that be not an executed delivery, I know not what is fo. Then all enquiry, as to what happened after the 29th of *December*, is befide the purpofe. It fignifies nothing what was the ulterior deftination of the goods after an executed delivery. If, indeed, the marking of the timber by the plaintiff's agent at *Moat Bridge* had not been done with the knowledge and confent of the defendants, the vendors; it may be admitted for this purpofe, that they would not have been bound further than they were already bound by what had taken place as between them and the original vendees: but by what had paffed on or before the 29th, the defendants recognized the transfer of the property to the plaintiff, and from that time a new perfon became liable to them for the wharfage.

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GROSE J. There was an exprefs affent by the defendants to the transfer of the property from the *Dixons* to the plaintiff.

LE BLANC J. The plaintiff having given notice to the defendants that the *Dixons* had fold the property to him, and his then marking them as his own, made an end of the tranfit, and the defendants could no longer retain or ftop the timber.

BAYLEY J. It is clear that, after the defendant's affent to the transfer from the *Dixons* to the plaintiff, and to the marking of the timber by the plaintiff's agent, the defendants could no longer ftop it in tranfitu.

Rule difcharged.

The KING *againft* The Inhabitants of the Parts of LINDSEY in the County of LINCOLN.

Saturday, June 29th.

A canal company, authorized by an act of parliament to make the river *Bain* navigable, and to make and enlarge certain navigable cuts, and build bridges and other works connected with the navigation, having for their own benefit made a navigable cut and deepened a ford which croffed the highway, and thereby rendered a bridge neceffary for the paffage of the public, which was accordingly built at the expence of the company in the firft inftance, are bound to maintain the fame; and the burthen of repair cannot be thrown upon the inhabitants of the (county) parts of *Lindfey*, in the county of *Lincoln*. The company were found to have profitable funds for the purpofe.

THIS indictment charged that for 18 years paft there has been and ftill is a certain public and common bridge in the parifh of *Coningfby*, in the parts of *Lindfey*, over the river *Bain*, at a place called *Butt's Ford*, fituate in the king's common highway leading from the town of *Coningfby* to the town of *Tatterfhall*, in the fame parts, &c. ufed by all the king's fubjects with their carriages, &c.; and that the faid bridge was, on the 31ft of *December*, 49 *Geo.* 3. ruinous and broken down, &c, and that the defendants were bound to repair it.

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The defendants pleaded, that the Company of Proprietors of the *Horncastle* Navigation, in the county of *Lincoln*, mentioned in an act of the 32 *Geo.* 3., (hereinafter set forth,) after the 1st of *June* 1792, and before the taking of this inquisition, to wit, on the 31st of *January*, 35 *Geo.* 3., *for their own use, benefit, and convenience*, and under and by virtue of the authority and powers vested in them by that act, made a navigable cut near the side of the river *Bain*, communicating therewith, to straighten the course of the river, and to avoid obstructions to the navigation of it; and through and along which navigable cut, large quantities of water, to wit, of the said river, from the time of making such navigable cut, have continually flowed and still flow; and that the said company of proprietors afterwards, &c. under the same authority and powers, erected the said bridge (in question) *upon and over the said navigable cut* so made as aforesaid, *and not upon and over the ancient course and channel of the said river*; (in and along which ancient course and channel, near to the said navigable cut, divers other large quantities of water have continued from the time of making the said navigable cut, to flow,) *no bridge being there before, or required there, until the making of the said navigable cut*: and that the said company of proprietors *the said navigable cut* so made as aforesaid, from the time of the making thereof until the taking of this inquisition, *have maintained and continued, and still do maintain and continue, for their own use, benefit, and convenience.* By reason of which said several premises the said bridge so erected the said company of proprietors of right ought to have upheld and repaired, &c. and still of right ought to uphold, repair, and rebuild as need may require, &c. The replication

replication insisted on the obligation of the inhabitants of the parts of *Lindsey* to repair the bridge; on which issue was joined to the country.

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The only question made on the trial, at the last assizes at *Lincoln*, was whether the inhabitants of the parts of *Lindsey*, or the *Horncastle* Navigation Company, were bound to repair the bridge: and a verdict was taken by consent for the prosecution, subject to the opinion of this Court on the following case.

An act of the 32 *Geo.* 3. *c.* 107. intituled, "An act "for enlarging and improving *Tattershall* canal, from the "river *Witham* to the town of *Tattershall*, and extend- "ing the same into the river *Bain*, and for making the "*Bain* navigable from thence to the town of *Horncastle*, "in the county of *Lincoln*, and also for amending and "rendering complete the navigable communication be- "tween the *Witham* and the *Fosdike* canal, through the "high bridge in the city of *Lincoln*," enacts, "That *it* "*shall and may be lawful* for the said company of pro- "prietors, and they are hereby *authorized and empowered* "to deepen, widen, and enlarge the said canal, from "the junction thereof with the river *Witham* to the "town of *Tattershall*, and to extend the same into the "river *Bain* within the parish of *Tattershall*; and also to "make the river *Bain*, and the several streams com- "municating therewith, near or in the town of *Horn-* "*castle*, navigable from the junction with the said canal "to the town of *Horncastle*; and also to make any "navigable cuts at and near the sides of the river *Bain*, "to straigthen the course of the said river, and to avoid "any mills or obstructions to the navigation thereof. "And in order to make and complete the navigation of "the said river, and the several other works by this act

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" authorized, &c., the ſaid company ſhall and are alſo " hereby empowered to dig and cut the banks of the " ſame canal, river, and ſtreams, and to widen and " deepen the ſame; and alſo to erect in or upon the ſaid " canal and river *Bain*, and the ſtreams communicating " therewith, and the ſeveral cuts to be made as afore- " ſaid, and upon the lands adjoining, &c. ſuch and ſo " many *bridges*, piers, arches, tunnels, ſluices, culverts, " locks, flood-gates, weirs, pens for water, ſtaunches, " drains, wharfs, quays, houſes, warehouſes, landing- " places, weighing-beams, cranes, ways, roads, and ſuch " ſtones or poſts, with marks for aſcertaining the " number of miles of or in the ſaid navigation; and " alſo ſuch other works and conveniencies as the ſaid " company ſhall think requiſite and neceſſary for or re- " lating to the carrying the purpoſes of this act into " execution; and from time to time *to alter, repair, and* " *amend, or diſcontinue the ſame, or any of them*, and to " divert, alter, widen, enlarge, and extend any *bridges*, " ways, roads, cuts, ſluices, and other works and con- " veniencies already erected, &c. within the limits of " or near to the ſaid intended navigation; and alſo to " make ſuch towing-paths, &c. for towing boats, &c. " upon the ſaid navigation, and to keep the ſame from " time to time in repair; and alſo to conſtruct all other " works, matters, and things, which they ſhall think " proper or neceſſary for the making, improving, com- " pleating, preſerving, and uſing the ſaid navigation, " according to the true intent and meaning of this " act," &c.

When this act paſſed, the courſe of the river *Bain* interſected the common highway above-mentioned at a place called *Butt*'s *Ford*. The river in this place was fordable,

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fordable, except occasionally in times of flood, and no bridge had ever been erected over it. In 1793 the company, for the purposes of the navigation, and by virtue of the powers vested in them by the above act, made a navigable cut near the river *Bain*, and across the said highway, at the distance of about 100 yards from *Butt's Ford*. This cut rendered the highway impassable, and the company built over it the bridge in question; and about the same time built a culvert for the passage of carriages and travellers over the old channel of the *Bain* at *Butt's Ford*. The waters which flow along the course of the *Bain*, above the point where the cut communicates with the river, have been diverted into this new channel, which is of sufficient dimensions for the passage of the average waters of the river; but in times of flood the surplus waters flow along the old channel. The drainage waters of the county, which, before the cut was made, run into the *Bain*, still fall into the old channel, and with the flood-waters pass in the same course through the culvert at *Butt's Ford*. The bridge in question has been repaired by the company in the only instance in which it has required repair. It has never been repaired by the inhabitants of the parts of *Lindsey*. The company collect tolls upon their navigation, and after defraying all charges, divide upwards of 5*l*. per cent. on their capital.

Abbott was to have argued on the part of the prosecution, in effect for the canal company; and *Balguy*, Jun. contrà: but *the Court*, after their late decision against the *Medway* Navigation Company (*a*), founded upon a

(*a*) *The King* v. *The Inhabitants of the County of Kent*, 13 *East*, 220.

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review of the former cafes upon the fame fubject, thought the prefent cafe too clear for argument. And it was then admitted that it could not be diftinguifhed upon principle from the cafe of the *Medway* Navigation Bridge; particularly as the act in queftion only *authorizes and empowers*, but does not compel the company to execute any of the works mentioned in it.

Lord ELLENBOROUGH C. J. alfo obferved that the act authorized the company not only to alter, repair, and amend, but even to *difcontinue* any of the works before authorized to be erected; amongft others, any bridge: and the inhabitants of a county could never have, by law, a permanent burthen thrown upon them to repair a bridge of which they had not the permanent ufe and enjoyment fecured to them.

GROSE J. The defendants cannot be liable to repair a bridge erected and continued for the private benefit of the company; for without the cut made by the company for their own benefit, there would be no neceffity for the bridge.

LE BLANC J. The circumftances of this cafe are very nearly the fame as occurred in the late cafe of the indictment againft the Inhabitants of *Kent*, and muft be governed by the fame principle. The authority given to the company to make the cut, which rendered the highway impaffable without a bridge, muft create an obligation in them to erect the bridge, though the word *authorize* in the act might not of itfelf create the obligation.

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BAYLEY J. The bridge is rendered neceffary for the purpofes of the company, but not for the purpofes of the inhabitants of the Parts. The inhabitants might have continued to ufe the ford as they did before the works executed by the company for their own benefit deprived them of the ufe of it.

Verdict and Judgment for the Defendants.

DOE, Leffee of ANN DIDSBURY and C. FLINT, *against* THOMAS and Others.

Saturday, June 29th.

Where a teftator, between 50 and 60 years ago, devifed land to his fon for life, remainder to his grandfon for life, remainder to the heirs of the body of the grandfon, remainder to the leffor of the plaintiff in tail; between which latter and the defendant, the devifee in fee of the fon, the queftion was, whether the land in difpute, which had been occupied by the fon in the life-time of the teftator, was part of the entailed eftate, or had been acquired by his own purchafe; evidence of *reputation that the land had belonged to Sir J. S., and was purchafed of him by the firft teftator*, is not admiffible; though coupled with corroborative parol evidence that the land had belonged to Sir *J. S.* before the occupation of it by the fon, and alfo by a deed of conveyance of another farm in the fame place from the firft teftator to a younger fon about the fame period, in which it was recited that the land thereby conveyed had been then lately purchafed, *amongst other lands*, by the teftator of Sir *J. S.*

THIS was an ejectment to recover a farm confifting of 35 acres of land, in the parifh of *Tidefwell*, in *Derbyfhire*, which was tried at *Derby*, before *Wood* B. *Ann Didfbury*, the leffor, claimed the premifes under the will of *Samuel White*, dated 26th of *November* 1754, whereby he devifed them by the defcription of "all thofe his clofes, lands, and hereditaments, with the appurtenances, fituate at *Tidefwell*, *then in the poffeffion of his fon* Richard White, to truftees, (*C. Flint*, the leffor, being the executor of the furviving truftee,) for a term of 500 years, in truft to raife 260*l.* for certain purpofes; and fubject thereto, to his fon *Richard White* for life; remainder to his grandfon *Richard White* for life: remainder to the heirs of the body of his faid grandfon *R. W.*; remainder to the heirs of the body of

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his said son *R. W.*; remainder over to other children. The testator died in 1761. His son *Richard*, (who was baptized in 1716, and had been in possession of these premises in his father's lifetime and up to his death,) continued in possession till his death in 1772, when he left a son, *Richard*, (the grandson named by the testator *Samuel*,) and a daughter, *Ann*, the lessor of the plaintiff. *Richard*, the grandson, who was born in 1750, entered upon the death of his father, and continued possessed till his death in 1803. He died without issue, and not having suffered a recovery, but made a will devising the premises to the defendants. On his death *Ann Didsbury*, the lessor, claimed as heir of the body of the first *Richard*, the son of the testator, under the limitation in his will.

The only question made at the trial was whether *Samuel White*, the testator, was seised of these premises at the time of making his will and at his death; the plaintiff insisting that he was so seised; having, as it was alleged, *purchased them of Sir* John Statham, and permitted his son *Richard* to occupy them until his (the testator's) death. It appeared that the premises in dispute consisted of a farm called the *Meadow Farm*, originally seven closes, but now divided into nine, and in all 35 acres: and it was proved by several witnesses that one *George Robinson*, *who was tenant to Sir* John Statham, occupied the farm before the first *Richard White* had it; and that *Richard* took possession of it about 61 years ago, and continued possessed as long as he lived, and occupied no other land which could have been his father's during that time. That his father, *Samuel*, lived from 10 to 14 years after the first *Richard* was in possession of the farm. But another witness, who also deposed to the fact of the first *Richard*'s taking possession of and occupying

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the *Meadow Farm* at the same time when his brother, *Edward White*, occupied another farm called *Foxlow's-Croft*, said that *both farms were reputed to be Sir* John Statham's, *and to have been purchased by* Samuel White *of Sir* John Statham *at the same time*. Then a deed was proved, dated 25th of *March* 1752, and made between *Samuel White* of the one part, and *Edward White*, one of his sons, of the other part; whereby *Samuel White*, in consideration of natural love and affection, &c. bargained and enfeoffed his son *Edward* and his heirs of all that farm, &c. within *Tideswell*, called *Foxlow's Croft*: *all which said farm, &c. have been lately purchased* AMONGST OTHER LANDS AND HEREDITAMENTS *by the said* Samuel White *of and from Sir* John Statham, &c.; habendum to *Edward White* in fee.

Objection was taken by the defendant's counsel to the evidence of *reputation* before stated; but the learned Judge was of opinion that, *coupled with the deed* above-mentioned, the evidence was admissible. He thought that as it was in proof that Sir *John Statham* was the landlord of the *Meadow Farm* when it was occupied by *G. Robinson* before the first *Richard White*'s occupation of it; and that as the deed also proved that Sir *John Statham* was also the owner of *Foxlow's Croft*, and that *Samuel White* had purchased that, *amongst other lands and hereditaments*, of Sir *John Statham*; and as it was also proved that both the sons (*Edward* and *Richard*,) took possession of their respective farms at the same time; there was a sufficient basis laid to admit *reputation* that those *other lands and hereditaments* referred to in the deed were the *Meadow Farm*: and after summing up the whole evidence, he left it to the jury; telling them, that if in their judgment *Samuel White* were the owner of the

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Meadow Farm at the time of making his will, and at his death, *Ann Didsbury* was entitled to that farm as heir in tail under *Samuel White*'s will: and in that case they would give their verdict for the plaintiff. But if they thought that *Richard White*, his son, had purchased the farm himself, or had acquired the ownership in it otherwise than under his father's will, then the defendants were entitled to it under the will of the last *Richard*. The jury found for the plaintiff.

Clarke, in last *Easter* term, moved for a new trial, upon the ground of the objection taken at the trial against the admissibility of the evidence of *reputation*, that the land at *Tideswell*, described in the will as then in the possession of the testator's son *Richard*, *had belonged to Sir* John Statham, *and was purchased of him by* Samuel White, *the testator*. He insisted that in no case was *reputation* admissible to prove ownership or possession of private property. And a rule having been granted,

Vaughan Serjt. now appeared on the part of the plaintiff, and admitting that reputation alone in a matter of private right was not admissible in evidence, contended that it was properly received when accompanied, as it was in this case, with the possession of the land at the time by the party to whom the evidence referred, and coupled as it was with the deed proved, the contents of which were confirmatory of the reputation. He also suggested the inutility of the present application, even if the Court should be of opinion that the evidence of reputation was not receivable, as there was other evidence sufficient to sustain the verdict; and he also stated that the

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leffor of the plaintiff, fince the trial, had procured the original deed of conveyance of the land in queftion from Sir *John Statham* to the teftator. Whereupon,

The Court agreed that the rule muft be made abfolute: Lord *Ellenborough* C. J. faying, that it was very unfortunate for the leffor, where the verdict muft be the fame upon another trial, that they fhould be obliged to fend the caufe to trial again.

Rule abfolute (*a*).

(*a*) The admiffibility of evidence of this defcription has been vexata queftio for many years in *Weftminfter-hall*; as the following notes, which I have taken from time to time, will fuffice to fhew.

The following is the fame cafe which is reported in 4 *Term Rep.* 157. for another point, which came on upon demurrer, in *Hil.* 31 *Geo.* 3. and where the plaintiff had leave to amend.

Qu. Whether general evidence of reputation as to a prefcriptive right of digging ftones on the lord's wafte, annexed to a particular eftate, be admiffible? Two Judges againft two. But one of thofe who held the affirmative thought it required other evidence of the right to be firft laid as a foundation. It feems, however, that fuch evidence may be given as to a particular cuftom, though not as to a private prefcription by three to one.

Morewood againft *Wood*, *M.* 32 *Geo.* 3. *B. R.*—Trefpafs for breaking and entering the plaintiff's clofe called *Swanwick Common*, in the parifh of *Alfreton*, in the county of *Derby*, and digging ftones therein, and carrying them away, &c. The defendant pleaded, that there are certain waftes or commons lying open to one another, one called *Swanwick Common*, being the clofe in which, &c. the other called *Swanwick Green*, in *Alfreton*, &c.; and that he was feized in fee of a meffuage and lands in *Alfreton*, in right of which he prefcribed for the liberty of digging for and carrying away all neceffary flags and ftones in *Swanwick Common*, and in *Swanwick Green*, for the repair of his houfes, fences, &c. The plaintiff replied, that he was lord of the manor of *Alfreton*, and that the defendant of his own wrong committed the trefpafs. The defendant, in his rejoinder, infifted on his prefcriptive right as ftated in the plea; on which iffue was joined. At the trial before *Hotham* B. at *Derby* affizes, the defendant called many witneffes, who proved that, for between 60 and 70 years paft, he and thofe from whom he claimed had been in the conftant exercife of the right ftated in his plea; in many inftances to the knowledge of the lord, who had threatened to bring actions, and been dared to do fo by the defendant's anceftors, who infifted on their right. On the other hand, the plaintiff produced a prefentment in 1717, of the freeholders of the court baron of the manor of

Where a perfon had been dead a great number of years, whofe hand-writing was required to be proved, it was done by fhewing the fimilarity of the hand-writing in queftion to the hand-writing of his will, and no objection was taken to it, either at the bar or by the Court.

1811.

MOREWOOD *against* WOOD.

Alfreton, of which the plaintiff is lord, and which presentment was signed by one *Robert Wood*, the foreman, and others; which name of *Robert Wood* was proved to tally with the subscription (1) to the will of *Robert Wood*, the grandfather from whom the defendant claimed, and which will was produced from the registry. One of the items in that presentment was,—"If any person gets stone without leave of the lord of the manor, we pain him 10s." The plaintiff also called another witness to prove that, in a conversation with the defendant's uncle, from whom the defendant also claimed, the uncle had admitted that the lord of the manor had the right, and he would not be beholden to him for the stone. The jury found for the defendant. Thus much appeared on the Judge's report, on a motion for a new trial. But the plaintiff's counsel stated further, (which was admitted by the other side, and so taken by the Court, that the learned Judge had rejected other evidence which they had tendered, and for which alone the new trial was moved for, viz.

1st, Other presentments of a similar nature to the one received in evidence; but to which no subscription could be proved by any person from whom the defendant claimed: this was offered as evidence of *reputation*.

2d, General *parol* evidence of *reputation*, that none but the lord had a right to dig stone, &c. on the locus in quo.

A rule nisi having been granted; *Chambre*, *Clarke*, *Sutton*, *Willis*, and *Ascough* contended, in support of their rule, that a general custom or prescription, covering all the estates of the tenants of the manor, might clearly be proved by evidence of reputation; and that there was no solid distinction between that case and the case of a particular prescription. There were no title deeds in the one case more than in the other, to which, as to a more certain criterion, reference could be had. In both instances the right rested on memory of particular instances of the exercise of it. In the case of a modus, reputation is evidence; and yet that relates to a particular estate. In the *Bishop of Meath* v. *Lord Belfield*, in 1747, cited in *Bull. N. P.* 295., it was held that evidence of reputation was admissible in a quare impedit, that one *Knight* had been in by the presentation of Lord *R.*; which is a stronger case than this. The case of *Webb* v. *Petts*, *Noy*, 44. was clearly the case of a modus for a particular farm; and there the Court held hearsay evidence to be sufficient. Such evidence as this is also admissible in the case of a manerial custom; and yet the public have as little to do with the custom of a particular manor as with a private prescription. Other persons in the parish may claim the same right as the defendant; and then it might have been laid as a custom; in which case these presentments would have been decisive evidence against it. So that by laying it as a prescriptive right annexed to each farm, instead of a custom, all the lord's proof of his right is gotten rid of; and the tenants may give in evidence those very tortious acts as evidence of a prescription, all which united together

(1) Vide *Roe* v. *Rawlings*, 7 *East*, 282.

could

could not have supported a custom against the positive written testimony subscribed by all their ancestors who were tenants. Here, they said, there was sufficient to ground the hearsay evidence on.

The counsel on the other side were not heard by the Court, who made several observations during the argument, to which the counsel for the plaintiff adapted their answers. On granting the rule nisi,

Lord KENYON C. J. said, he doubted very much if evidence of reputation could be adduced in support of any prescription, unless it affected the public interest in some way or other.

ASHHURST J, in the course of the argument, said that if this had been laid as a custom, he conceived that general reputation would have been evidence: but in the case of a private prescription, he doubted it very much.

BULLER J. observed that the practice had been different on different circuits. On the *Oxford* it has been the practice to reject, and on the western circuit to receive this sort of evidence. But upon the latter, I have told the counsel, that I would indeed receive such evidence, if they pressed it, but that, in summing up, I should tell the jury that they were to decide upon the other parts of the case.

Lord KENYON C. J. (after the argument.) The evidence given by the defendant of an usage of about 70 years is extremely strong in his favour; and the only evidence to weigh against it is that of the presentment signed by *Robert Wood*: but that is not necessarily inconsistent with it. The lord might have the general right, and yet a particular tenement have a prescriptive right also. On that ground, therefore, there is no pretence for impeaching the verdict. With respect to the other question raised respecting the rejection of general evidence of reputation; it is involved in great dispute; and one is apt to imbibe prejudices from the opinion one has always heard inculcated. Upon the *Oxford* circuit which I went, such evidence was never received; and I cannot help thinking that that practice is best supported by principle. Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural to suppose that they may be conversant with the subjects, and that they should discourse together about them, having all the same means of information. But how can this apply to private titles, either with regard to particular customs or private prescriptions. How is it possible for strangers to know any thing of what concerns only these private titles? I barely, however, throw out these hints as the ground of my present opinion; laying in my claim to change that opinion if I should hear any thing which shakes it.

ASHHURST J. declared himself of the same opinion: adding, that the utmost which the evidence offered went to prove in the present case was that the lord had the general right; but that did not negative a particular right, provided it was made out in evidence, which it had been in the present instance.

1811.

Morewood *against* Wood.

Buller J. I have already mentioned what has been the general practice on the *Oxford* and on the Western circuit; and as there are two judges from each of those circuits in court (1), it is hardly likely for us to agree upon the general point. But thus far I agree with my lord and my brother *Ashhurst*, that in no case ought evidence of reputation to be received, except a foundation be first laid by other evidence of the right. Now here there was no foundation, or at least a very slight one, in comparison to the evidence given by the defendant. But I cannot agree that it ought not to be received at all. It was settled that it ought in the cases cited in argument, and also in many other instances which relate merely to private titles: in one in particular, as to whether such a piece of ground is parcel of one close or another. So again in the case of pedigrees. But as to this particular case, the evidence is very strong with the defendant. It was not proved that the estate in question was in the possession of the defendant's grandfather at the time he signed the presentment which was read in evidence: and even if that were made out, all the evidence since for above 60 years is the other way. The defendant's ancestors have all that time taken stone in defiance of the presentment, and in the face of the lord himself, who was dared to bring any action for it. Now, supposing all the evidence of reputation had been received, I think it ought to have weighed so slightly with the jury, that the Court ought not to grant a new trial. For I do not know that, because evidence which ought to have been received was rejected, therefore the Court are bound to grant a new trial, if they see clearly that the verdict is right, notwithstanding such evidence had been admitted.

Grose J. was of the same opinion as *Buller* J. on the general point, that evidence of reputation is to be admitted. I confess, he said, that habit has so enured my mind to think it admissible in these cases, that I cannot change my opinion without much further consideration: though I certainly should if, upon future thoughts, I should be convinced that the practice of the western, and I believe also of the northern circuit, is wrong. Once, indeed, I remember the case of a pedigree tried at *Winchester*, where there was a strong reputation throughout all the country one way, and a great number of persons were examined to it: but, after all, the whole was overturned, and proved to have no foundation whatever, by the production of a single paper from the Herald's Office: which shews, to be sure, how cautiously this sort of evidence ought to be admitted.

Rule discharged.

In the case of *Outram* v. *Morewood*, *Hil.* 33 *Geo.* 3., 5 *Term Rep.* 123., Lord *Kenyon* C. J said, "Although a general right may be proved by traditionary evidence, yet a particular fact cannot." The particular fact there was whether a certain close, then called the *Cow close*, had

(1) Lord *Kenyon* and *Ashhurst* J. had gone the *Oxford*, and *Buller* and *Grose* J. the Western circuit.

been

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OUTRAM *against* MORRWOOD.

been part of the estate of Sir *John Zouch* in the 18th of *Eliz*, out of which certain rents and coals had been reserved: and all the Court agreed, that this fact could not be proved by entries made by a third person, deceased, in his books of receipts of rents from his tenant; considering such entries as no more than a declaration of the fact made by such third person; which was different from the entries of a steward, who thereby charges himself with the receipt of the money. And *Grose* J. distinguished this from the cases where traditionary evidence had been allowed, "because the tradition of a particular fact is not evidence."

Traditionary reputation is evidence of boundary between two parishes and manors: and this though the old persons deceased making the declarations claimed rights of common on the respective wastes, which might be enlarged by such evidence; there being no litigation pending or in contemplation at the time, which could induce a belief that they had in view to make evidence for themselves, though the boundary had long before been and afterwards continued to be vexata questio.

In *Nicholls* v. *Parker*, *Exeter* summer assizes 1805, upon a question of boundary between two parishes and manors, whether a certain common was within the parish and manor of *Holne*, of which Sir *Bourchier Wrey*, Bart, was lord, or within the parish of *Buckfastleigh* and manor of *Mainbow*, of which Colonel *Parker* was lord; *Le Blanc* J. admitted evidence of what old persons, now dead, had said concerning the boundaries of the parishes and manors; though not as to particular facts or transactions. And this, though these old persons were parishioners, and claimed rights of common on the wastes, which would be enlarged by their several declarations; there not appearing to be any dispute at the time respecting the right of the old persons making the declarations, at least no litigation pending; (for, in truth, the boundary had been long in dispute between the respective parishes and manors, and intersecting perambulations had been made both before and after such declarations by the respective parties;) so that those persons could not be considered as having it in view to make evidence for themselves at the time. And in support of the same opinion were cited, *The King* v. *The Inhabitants of Hammersmith*, sittings at *Westminster* after *Hilary* term 1778, before Lord *Mansfield* C. J. (1), and a case of *Down* v. *Hole*, at *Taunton*, in 1795, before *Lawrence* J. in both which the same point had been ruled.

But evidence of reputation of a boundary between two estates was rejected.

In *Clothier* v. *Chapman*, *Bridgewater* summer assizes 1805, where, in replevin, the question was whether *Street Hill*, alias *Ivythorne Hill*, a waste, was parcel of *Ivythorne Farm*, and the soil and freehold of one *Rooke*, or not; evidence was offered of declarations of old persons deceased, as to the ancient boundary of the waste belonging to *Ivythorne Farm*, that it extended to the inclosures on the north side of the hill: and 2 *Roll. Abr.* 186. *pl.* 5. tit. *Prerogative*, was cited in support of it, where it was held that such declarations, as to whether certain land was parcel of a manor or of an estate, were deemed admissible as between subjects, but not as against the crown: and *Davies* v. *Pierce*, 2 *Term Rep.* 53. was also cited. But *Graham* B. rejected the evidence in this case, where the question was not as to the boundary of a parish or manor,

(1) Vide *Peake's Evid.* (Appendix, 33.), and vide another case of *Ireland* v. *Powell*, *Salop* Spring Assizes, 1802, cor. *Chambre* J. *ib.* 13.

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Clothier *against* Chapman.

ner, but between one person's private property and another. There was a verdict afterwards for the defendant, by whom this evidence had been offered, so that the question could not be stirred again.

See the next case.

Saturday, June 29th.

Sir Thomas Stanley, Bart. *against* White.

To an action of trespass for cutting down and converting trees, which the defendant justified as growing upon his soil and freehold, the plaintiff replied that the *trees* were his *freehold*, and not the freehold of the defendant: and this was held to be proved by shewing that they grew on a certain woody belt, 15 feet wide, which surrounded the plaintiff's land, but was undivided by any fences from the several closes adjoining, of which it formed part, belonging to different owners; and that from time to time the plaintiff and his ancestors, at their pleasure, cut down, for their own use, the trees growing within the belt, and that the several owners of the different closes inclosing the belt never felled trees there, though they felled them in other parts of the same closes, and that when they made sale of their estates, the trees in the belt were never valued by their agents, because they were reputed and considered to belong to the plaintiff and his ancestors, in which the several owners acquiesced.

THE plaintiff declared in trespass against the defendant for cutting down and converting to his own use oak and ash trees of the plaintiff, at the parish of *Eastham*, in the county of *Chester*: to which the defendant pleaded not guilty: and, 2dly, that a close called *Sower Field*, in the same parish, &c. before and at the time when, &c. was and still is the close, soil, and freehold of the defendant; and that the said *trees*, before and until the said time when, &c. were growing in and upon the said close, and before and until that time were his *freehold*; wherefore he cut down and converted them, &c. The plaintiff replied to the special plea, that the said trees, before and until the said time when, &c. were the *trees and freehold of him the plaintiff*, and not the freehold of the defendant, in manner and form as in that plea alleged, and concluded to the country. The cause was sent by mittimus from this Court to be tried by the Court at *Chester*, and a very special report was afterwards made by the learned Chief Justice of

Chester,

Chester, as well of the courſe which the cauſe took, as of the evidence given at the trial. 1811.

STANLEY, Bt. *againſt* WHITE.

It was ſtated by the plaintiff's counſel, in his opening, that independent of evidence of ownerſhip directly applicable to the trees in queſtion, it would be proved that the plaintiff's manor was ſurrounded on all ſides by a belt of land extending 15 feet beyond a circular hedge, within which belt, the whole of it being more or leſs wooded, the trees in queſtion had been cut. That the exiſtence of this belt would be proved by the exerciſe of right over it on the part of the *Stanley* family, *and by reputation* (a). That it would appear that while timber had been from time to time felled by the different owners of the fields into which the belt extended, their cuttings had been always confined to trees growing on ſuch parts of the reſpective fields as were not within the belt; and that all trees within it had always been left ſtanding by them, though equally fit for cutting when the others were cut; and that when cut within the belt, as they had alſo been from time time, it was always by the order and for the uſe of the *Stanley* family. The defendant's counſel, not objecting to the evidence opened being given de bene eſſe, laid in his claim to object in the concluſion to all the evidence of *reputation*, or of acts of ownerſhip by the *Stanley* family *as to any other part of the belt* other than within the defendant's land where the trees in queſtion had been cut, as not applying to the iſſue to be tried; referring to the rule, that the cuſtom of one manor is not evidence of the cuſtom of any other; nor the cuſtom of tithing in one pariſh evidence of that of another pariſh: though he admitted that it would be otherwiſe

(a) See the laſt caſe, and the notes annexed to it.

in

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STANLEY, Bt. *against* WHITE.

in cafes where different fpots might be connected in refpect of fome common quality or general rule applicable to all; as in the inftances of border-law, and of a general cuftom of tithing, where the cuftom laid included, as parts of a larger diftrict, two or more parifhes. To this it was intimated from the Bench, that, without deciding upon the objection before the proper time fhould arrive, it feemed to them that the evidence opened appeared rather to lie within the line of admitted exceptions, than within the general ground of objection taken. But, as much would depend upon the general connexion of the particular facts proved, the whole of the evidence fhould be received de bene effe, as propofed, referving to the defendant's counfel the right of objecting to the applicability of any part of it, as it fhould turn out in the refult; and upon this underftanding the caufe proceeded.

The evidence was then ftated, which was of two defcriptions; 1ft, that which related to the acts of the parties interefted in refpect of the defendant's own land whereon the trees in queftion grew. 2dly, That which related to acts of ownerfhip by the *Stanley* family *in other clofes* connected with the belt, together with the acts of their refpective owners and occupiers. Of the firft defcription, the refult of the evidence was that the defendant claimed under one *Bradford*, who was the former owner of the *Sower Field*, on which the trees in queftion grew. That the land, being then upon fale, *Bradford* employed one *Williamfon* to value the timber belonging to him; referring him to *Lyon*, his tenant in poffeffion, to point out what that timber was; thereby making *Lyon* his agent for that purpofe: and upon the information of *Lyon* the tenant, ftating that the timber

trees

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STANLEY, Bt. *against* WHITE.

trees in question which grew within the belt in *Bradford*'s field, being 8 or 9 in number, did not belong to *Bradford* but to Sir *Thomas Stanley*, those trees were omitted in the valuation made for *Bradford* of the rest, amounting to nearly 100 trees. That *Bradford* was made acquainted with what had been thus done by *Williamson* and *Lyon* his appointed agents, and acquiesced in their conduct, not only by abstaining from making any objection, but by selling the remainder for as much less as the trees in question were worth. That the land was on sale as well as the timber, and the purchaser was to take the latter at *Williamson*'s valuation. That *Williamson* afterwards purchased the *Sower Field*, but sold it again to a Mr. *Richards*, by or under whom the defendant now claimed; and the defendant made his purchase of the timber at the valuation which excluded the belt trees; and they were cut down by his order before the action brought. Under the second description of evidence, *Lyon*, the former tenant who continued in possession after the defendant's purchase, said on his examination, that when the timber was to be valued for *Bradford* his landlord, he had not pointed out the trees in the belt, *because he would not bring his landlord into mischief; having heard many years ago, and ever since, that the plaintiff's boundary included them.* He also spoke of a tree cut down 8 years before, while he was tenant to *Bradford*, within the belt, which he did not mention to his landlord, *because he thought it belonged to the* Stanleys. *Edwards*, a witness aged 71, had known all his life the ring-fence of the *Hooton* estate (the plaintiff's) to which the *Sower Field* adjoins. He remembered falls of timber in the *Big Sower Field* (another field adjoining on the belt,) as far back as 50 years. His brother was the tenant

of

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STANLEY, Bt. *against* WHITE.

of it under one *Edmonſtone*. No trees were felled by *Edmonſtone* within 15 feet of the fence (the belt). *The tenant ſaid* that the trees (within the belt) were Sir *Thomas Stanley*'s. There was a ſecond fall of timber there 35 years ago, while *Edmonſtone* was ſtill the landlord; but none was felled within that diſtance of the plaintiff's fence. There was a third fall 25 years ago, by the ſame *Edmonſtone*; and though all the trees fit for cutting in the reſt of the field were then felled, yet none were felled within the 15 feet. The ſame witneſs was tenant many years ago, in the time of Sir *William Stanley*, of another field called *White*'s, in the ſame relative ſituation to the plaintiff's boundary. A Mr. *Lee* was his landlord, who then had a fall of timber in the field; but none was felled within the 15 feet. The ſame witneſs proved that the greateſt part of the 15 feet was covered with bruſhwood, and that the trees within it belonged to Sir *William Stanley*. *Skillern*, a witneſs aged 69, had alſo known the ring-fence all his life from the time of Sir *Rowland Stanley*, and had been employed to cut timber in different parts of the ring-fence for 55 years paſt. The width of the ring-fence throughout was always 15 feet, and on the inſide of it there was a cloſe-fence all the way round. The ring-fence conſiſted of timber and bruſhwood, and the witneſs had *cut down timber and ſmall trees within the* 15 *feet in moſt parts of the ring-fence for the* Stanley *family*; and had never known the 15 feet in cultivation, *and never knew any body but the* Stanleys *cut within that diſtance.* He ſpoke to the 15 feet being the diviſion between the townſhip of *Hooton* and *Haughton*; that it had been always *reputed* to be the boundary.

Upon

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STANLEY, Bt. *against* WHITE.

Upon the conclusion of the evidence the plaintiff's counsel offered, to avoid dispute, to wave all that did not relate to the close in question; but the defendant's counsel objected to this after the impression had been been made on the jury by hearing it, and stood upon his original objection to the admissibility of the second description of the evidence above noticed. Whereupon the plaintiff's counsel retracted his offer of having it struck out of the notes, and the Chief Justice *summed up the whole* to the jury; telling them that the issue joined on the record was whether the trees in question were the trees and freehold of the plaintiff, who claimed the trees only, and not the soil on which they grew: that such a claim might exist in point of law; as if one grant to another and his heirs all trees in such a part of a forest, saving the soil; the grantee has a fee to take in alieno solo; or if one grant the soil, reserving the trees. That undisputed possession of property was evidence of the right to it, and that in this respect the direct evidence given as to the trees in question applied very strongly in support of the plaintiff's claim, independent of the collateral evidence relative to other parts of the belt, which was objected to. And the Court, after particularizing the whole of the evidence of the first description, to which no opposing evidence had been offered on the part of the defendant, left the question of fact to the jury, which was a special jury, and had had a view; and they found for the plaintiff; and on being asked by the Court whether their verdict was grounded upon the whole of the evidence, or upon that only which applied exclusively to the trees in question in the *Sower Field*; they answered that it was upon the latter evidence exclusively.

Gleed,

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STANLEY, Bt. *against* WHITE.

Gleed, in moving for a new trial in last *Easter* term, stood upon the objections which had been made at the trial to the admissibility of the evidence, both as to the reputation that the trees within the belt were the property of the *Stanley* family, and also as to acts of ownership by that family in other parts of the belt than the close in question, belonging to third persons; which he insisted did not apply to the issue to be tried. And that after the impression had been made by such evidence, the whole of which was finally summed up by the Court and submitted to the jury, it was no answer to the objection, if well founded, that the jury had at last stated that their verdict was founded upon the rest of the evidence exclusively.

Lord ELLENBOROUGH C. J. then said: If lands be held all under one general title, throughout one entire district, and here the one entire belt may be considered as one entire district, I see no objection to receiving acts of ownership in different parts, as evidence of the same right throughout the whole. Why may there not have been an original grant of the whole soil of the belt, reserving the trees, though the property in the several closes has in course of time been subdivided? And upon *Gleed*'s observing, that there was no evidence of the existence of any such grant, or that the lands round the belt were ever held under one title: and besides that, if a grant of the land, reserving the trees, were to be presumed, the presumption could only be of a reservation of the trees then growing; and some of the trees cut and taken in this instance were of 50 years' growth, and consequently must have sprung up long since any such grant and reservation could have been made: his Lordship answered, that there

may be a grant or reſervation as well of trees thereafter to grow on the ſoil, as of the trees then growing (*a*).

BAYLEY J. Acts of ownerſhip will be evidence of a grant or reſervation formerly made, though now loſt, conformably to the manner in which the rights of the parties continued to be exerciſed. And with reſpect to the evidence of declarations of tenants and others connected with other parts of the belt; it may be obſerved, that they were declarations accompanying acts of forbearance of the owners in not cutting trees within the belt when occaſions occurred.

The Court, however, ſaid, they would grant a rule to ſhew cauſe for the further conſideration of the caſe. But when it was now called on to be heard, and the report of the Chief Juſtice of Cheſter had been read, they ſtopped *Jones*, who was to have ſhewn cauſe againſt the rule, and deſired to hear the counſel in ſupport of it.

Gleed and *Coltman* then argued that, without the production of a grant, or of ſome evidence that it had once exiſted, though it were now loſt, the Court would not preſume that a freehold exiſted in the trees in the plaintiff, independent of the freehold in the ſoil, which was in the defendant, who was proved to be in the poſſeſſion of the land, as thoſe under whom he claimed had always been. This would be a freehold within a freehold, which, though it might exiſt by grant, would never be

(*a*) Vide Sir *Francis Barrington*'s caſe, 8 *Rep.* 136. *b*. The grant there was of all trees, &c. then growing, together with all trees, &c. which at any time thereafter ſhould grow in that part of the foreſt.

preſumed

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STANLEY, Bt. *against* WHITE.

presumed against the general rule of law, that he who is owner of the soil shall be taken to have every product of it. And there is the more reason for requiring strict proof in this case, inasmuch as if there ever had been such a grant, it might, if produced, have been found to be confined to trees then growing. [Lord *Ellenborough* C. J. The terms of an ancient grant now lost must be collected from the manner in which the right presumed to be derived under it has been exercised: and what objection in point of law would there be to a grant or reservation of trees then growing, or thereafter to grow upon the land. If it be meant to be contended, that there can be no such thing as a freehold in trees apart from the general ownership of the land whereon they grow, that is a question upon the record, on which you may move in arrest of judgment, or bring a writ of error.] Then they objected more particularly to the evidence given of the plaintiff's right. 1st, As to the general hearsay evidence of the right of the *Stanley* family, from their having cut trees within other parts of the belt; it did not appear that the land itself in such parts did not belong to them, as much of it was understood to do: and in such case no inference could arise in favour of the same right over the defendant's close: besides the general objection to any hearsay evidence of a private right. [*The Court*, however, seemed to consider that all the evidence of this description was merely explanatory of acts done, or forborne to be done, in particular instances by the owners or occupiers of different closes round the belt: and this was not further pressed: but the counsel proceeded to comment on the particular instances proved in evidence.] They then objected to the evidence of declarations made and acts done oy owners and occu-

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piers of other closes round the belt, held under different titles from that of the defendant. One instance spoken to was by the witness *Edwards*, who gave in evidence the declarations of his brother, when tenant to *Edmonstone*, upon a fall of trees within his close, that the trees within the belt were Sir *Thomas Stanley*'s. [Lord *Ellenborough* C. J. That was a declaration by the tenant against his own interest, as far as it went (*a*), within the ambit claimed by the *Stanleys*, and was explanatory, at the time, of the act of his landlord, forbearing when there was a fall of trees in the close, to cut any within the ambit.] There was no connexion proved between the titles of the several owners round the belt; without which no inference could be drawn in prejudice of one, from acts of ownership exercised by the *Stanley* family against others, which might depend upon the different terms of the conveyances to each. [Ld. *Ellenborough* C. J. The same law may be shewn by general evidence to govern one entire district, though it may affect the rights of different persons in different parts. It is then one entire thing, quoad that district: as in the case of the border law. In this case the eye may see that there is one continuity of belt; and the witnesses proving that the *Stanley* family have asserted the same right from time to time against different owners in different parts of the belt, as such, is evidence of their general right: and this may be supported by acknowledgments of others in-

(*a*) See *Richard Liford*'s case, 9 *Rep.* 48., that lessee of land for life or years has a particular interest in the trees; though the general interest of the trees remains in the lessor; for the lessee shall have the mast and fruit of the trees, and shadow for his cattle, loppings for fuel, and repair of fences, &c.: but the interest of the body of the trees is in the lessor, as parcel of his inheritance. And see also *Herlakenden*'s case, 4 *Rep.* 63. *b.* for this and the general point of the present case.

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terested to contest the right. *Le Blanc* J. The freehold of wastes is continually asserted by evidence of acts of ownerships in different parts.] Still the objection arises, that the titles of these several owners are derived from different conveyances.

Lord ELLENBOROUGH C. J. The presumption from the evidence is that all the land of the belt belonged originally to the same person, and that when he granted it out to others, he reserved the right to the trees then growing or thereafter to grow in the soil: and he and those claiming under him prove their right by exercising acts of ownership in cutting and taking away the trees from time to time, as occasion requires, in different parts of the belt. It is evidence of one reserved right in the original grantor, and not of different rights created by different conveyances. The soil of the whole was probably granted out entire in the first instance, reserving the trees; and the original grantee may have afterwards granted it out, in divided portions, to different persons. Whatever title is consistent with the established course of enjoyment may be proved by such enjoyment: and here was evidence of a right such as I have stated, and there is no evidence of any adverse right.

It was then suggested that, though this might be evidence for the plaintiff of his having an interest in the trees, it was no evidence of a *freehold* interest in them, as claimed by him in his replication. That one might have a right to trees as a profit apprender in another's soil, without having a freehold in the trees: and that it was difficult to say, how one could have a freehold in the trees growing in another's soil: and here the plaintiff

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plaintiff does not claim the soil itself. But Lord *Ellenborough* C. J. observed, that the plaintiff may not have claimed the whole that he was entitled to: and that perhaps the right to the land itself might be put in hazard, if the defendant could succeed in shewing that the plaintiff could have no freehold interest in the trees apart from the soil. But even if that were so, perhaps a reservation of the trees then growing or thereafter to grow in the soil might be taken to reserve so much of the soil as was necessary for the growth and sustentation of the trees. But without deciding that question, it was enough to say, upon a motion for a new trial, that the evidence sustained the right claimed; and the other was a question upon the record: *Le Blanc* J. observing, that the plaintiff admitted by the pleadings, that the freehold of the soil was in the defendant. And the rest of the Court agreeing, the rule for a new trial was discharged.

BENNETT *against* NEALE.

Monday, July 1st.

The 4th section of stat 43 *G.* 3. *c.* 46. providing that in actions on judgments recovered, the plaintiff shall not be entitled to costs unless by the order of the Court, or some Judge thereof, does not extend to an action brought to recover the costs of a judgment of nonsuit.

THE present plaintiff, having obtained judgment of nonsuit in a former action brought against him by *Neale*, the taxed costs of which judgment were 3*l.* 3*s.*, brought this action on the judgment to recover that amount; whereupon *Espinasse* moved upon the st. 43 *G.* 3. *c.* 46. *s.* 4. for a rule calling upon the plaintiff to shew cause why, upon payment of that sum, the proceedings should not be stayed without costs; the clause directing "that in all actions which shall be brought upon any "judgment recovered in *England* or *Ireland*, the plaintiff "in such action on the judgment shall not recover or "be entitled to any costs of suit, unless the Court in

 "which

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"which such action on the judgment shall be brought, "or some judge of the same court, shall otherwise order." And this, he said, was the first application on this clause of the act.

But *the Court*, on reading the clause, and comparing it with the preceding and subsequent clauses, were of opinion that it extended only to judgments recovered by plaintiffs, and not to a judgment of nonsuit: and therefore refused the rule.

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PORTER *against* PHILPOT.

Where a demand for plumber's work, and new materials found, amounting in value to 8*l*, was reduced below 5*l*. by the plaintiff's taking the old lead and allowing for it, instead of using it as far as it would go; in which case the original demand would have been under 5*l*.; the plaintiff is not entitled to his costs under the *Southwark* borough act, 46 *G*. 3. *c*. 87.; and it is not a demand reduced below 5*l* by balancing an account within the exception in the 12th section.

THIS was an action by a plumber for work and labour done, and materials found for the defendant, to the amount of 8*l*., reckoning the work and labour, and the value of the new materials: but at the trial before Lord *Ellenborough* C. J. at the sittings, it appearing that the defendant was entitled to a deduction for the value of the old lead which had been taken by the plaintiff at the accustomed valuation, the plaintiff only recovered a verdict for the difference, being 3*l*. 16*s*. 4*d*. Whereupon *Nolan* on a former day obtained a rule nisi for entering a suggestion on the roll, that the defendant was, at the time of commencing the action, &c. resident within the jurisdiction of the borough court of *Southwark*; in order to deprive the plaintiff of his costs under the st. 46 *G*. 3. *c*. 87. (local), extending the former borough-court acts (*a*) to suits for 5*l*.: and he cited *Clark* v. *Askew* (*b*), where a debt originally above, but reduced below 40*s*. by a part-

(*a*) 22 *Geo*. 2. *c*. 47., and 32 *Geo*. 2. *c*. 6.

(*b*) 8 *East*, 28.

payment

payment before the action brought was held to be within the former ftatutes.

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Abbott now refifted the rule, and referred to *Fountain, Adminiftrator*, v. *Young* (*a*), where, upon a fimilar application, it appearing that the plaintiff's demand had been reduced below 5*l.* by deducting the amount of two promiffory notes which the plaintiff's inteftate had received from him, and had not accounted for; the Court held, that the cafe was excepted out of the general operation of the act by the 12th fection, which provides that the act fhall not extend "to any debt for any fum, being the "*balance of an account* on demand originally exceeding "5*l.*" Now here there muft have been an account taken of the weight and value of the old lead, before the original demand could be reduced and liquidated.

Lord ELLENBOROUGH C. J. That was the cafe of a crofs demand: here the account is all on one fide, and is all refolvable into one original demand. The taking and allowing for the old lead is the fame as if he had melted the old lead and ufed it up, adding only fo much more as was wanted; and then the original demand would never have amounted to 5*l.*

Per Curiam, Rule abfolute.

But the plaintiff agreed to ftay his proceedings.

(*a*) 1 *Taunt.* 60.

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It does not appear that the master of any vessel is merely, as such, exempted by law from being impressed: and where it appeared to the Court that a person, whose father was stated to be acting as mate on board a coasting vessel of 52 tons, had been just before appointed to act as master, upon a supposition that he would be thereby exempted from being impressed, the Court refused even a rule to shew cause why he should not be brought up by habeas corpus to be discharged from on board a king's ship, where he was placed after having been impressed.

Anthony Barrow's Case.

CASBERD moved for a writ of habeas corpus to be be issued to the commander of his majesty's ship *Enchantress*, to bring up the body of *Anthony Barrow*, who had been lately impressed and carried on board that ship. He stated shortly from an affidavit, that the party for whom he moved had been, before he was so impressed, appointed to be master of the *Active*, a vessel of 52 tons burthen, navigating between *Poole* and *Bristol*; that he had signed bills of lading for the cargo at *Poole*, and otherwise acted as master.

Lord Ellenborough C. J. and the rest of the Court, had great doubt, upon this general statement, whether sufficient ground had been laid for granting a rule: and upon being referred to *Chalacombe*'s case (*a*), a few terms ago, where it was stated that the master of a vessel, as such, had been considered to be exempted from being impressed; his Lordship expressed a doubt whether that case (the circumstances of which were not then distinctly recollected or stated,) had not proceeded upon the construction of a particular act of parliament, enabling the masters of vessels in a certain trade to nominate certain mariners on board their vessels to be exempted from being impressed; from whence the Court had inferred that the legislature had impliedly exempted the master himself, who was to give the protection to the others. His Lordship then further enquired, what other men there were on board the *Active*, and whether this party had

(*a*) Since stated in *Boggin*'s case, in the last term, 13 *East*, 550.

been

been recently before appointed to act as maſter; for it appeared to be ſuſpicious to the Court, whether this appointment had not been colluſively made with a view to meet the ſuppoſed deciſion in the former caſe referred to.

Caſberd, upon this, read the whole of his affidavit, in which it was ſtated, that the father of the preſent applicant was acting as mate on board the ſame veſſel, the owner of which was on ſhore; and there was alſo another perſon on board.

The Court, under theſe circumſtances, thinking that the appointment of this party as maſter was at all events fraudulently made with a view to claim the protection now ſought to be obtained, by changing ſituations between the father and ſon on board the veſſel; the father probably being otherwiſe exempted, or leſs likely from age to be impreſſed; refuſed the rule.

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The KING *against* The Mayor, Aldermen, and Burgesses of the Borough of STRATFORD-UPON-AVON.

Though a charter of *Ed* 6th, granted upon the recited prayer of the *inhabitants* of the borough of *Stratford-upon-Avon*, "that the King would esteem them, the inhabitants, worthy to be *made, reduced, and erected* into a body "corporate and politic;" and thereupon proceeding to "*grant* (without any word "of *confirmation*) unto the *inhabitants* of the borough, that the same borough should be a "free borough for ever thereafter;" and then proceeding to incorporate them by the name of the Bailiffs and Burgesses, &c.; would, without more, imply a new incorporation: yet where the same charter recited that it was an *ancient borough*, in which a guild was theretofore founded and endowed with lands, *out of the rents, revenues, and profits* of which a *school* and an *alms-house* were maintained, and a *bridge* was *from time to time kept up and repaired*; which guild was then dissolved, and its lands lately come into the king's hands: and further reciting that *the inhabitants of the borough, from time immemorial*, had enjoyed *franchises, liberties*, free customs, *jurisdictions*, privileges, exemptions, and immunities, by reason and pretence of the guild and of charters, grants, and confirmations to the guild, *and otherwise*, which the inhabitants could not then hold and enjoy by the dissolution of the guild and for other causes, by means whereof it was likely that the *borough* and its *government* would fall into a worse state without speedy remedy: and thereupon *the inhabitants of the borough* had prayed the king's favour for *bettering the borough and government* thereof, and *for supporting the great charges* which from time to time they were bound to sustain, to be deemed worthy to be made, &c. a body corporate, &c.: and thereupon the king, after granting to the inhabitants of the borough to be a corporation (as before stated), granted them the same *bounds and limits as the borough* and the *jurisdiction* thereof *from time immemorial* had extended to:

And then the king, "willing that the *alms-house* and *school* should be kept up and maintained as theretofore (without naming the *bridge*,) and that the *great charges to the borough and its inhabitants* from time to time *incident*, might be thereafter *the better sustained and supported*, granted to the corporation the lands of the late guild:

And it further appearing by parol testimony, as far back as living memory went, that *the corporation* had always *repaired* the *bridge*:

Held, that taking the whole of the charter and the parol testimony together, the preponderance of the evidence was, first, that this was *a corporation by prescription*, though words of creation only were used in the incorporating part of the charter of *Ed.* 6th. 2dly, That the burden of repairing the bridge was upon such prescriptive corporation during the existence of the guild before that charter; though the guild, out of their revenues, had in fact repaired the bridge; which was only in ease of the corporation, and not ratione tenuræ; and that the corporation were still bound *by prescription*, and not merely *by tenure*; and therefore that a verdict against them upon an indictment for the non-repair of the bridge, charging them as *immemorially* bound to the repair of it, was sustainable.

THE first count of this indictment charged that, *from time immemorial*, there was and yet is a common and ancient stone bridge over the river *Avon*, which bridge is in the borough of *Stratford-upon-Avon*, in the county of *Warwick*, in a common and public ancient highway

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leading from *Birmingham* over the ſaid bridge to *Oxford*, uſed from time immemorial for all the king's ſubjects to paſs with carriages, &c.: that the bridge was out of repair; and that the mayor, aldermen, and burgeſſes of the ſaid borough of *Stratford-upon-Avon* had *immemorially* been bound, and been uſed and accuſtomed to repair it: and then charged them with the non-repair on this occaſion.

The ſecond count charged that, *from time immemorial*, there hath been and now is, in the borough of *Stratford-upon-Avon* aforeſaid, a certain body politic and corporate of the inhabitants of the ſaid borough, called and known from time to time by divers names of incorporation, and that the ſaid body politic and corporate for 100 years paſt has been and now is called and known by the name of the mayor, aldermen, and burgeſſes of the borough of *Stratford-upon-Avon*; and that from time immemorial there was and yet is a common and ancient bridge, &c. (following the ſame deſcription as before;) that the ſaid bridge was out of repair, and that the ſaid body politic and corporate were *immemorially* bound to repair it, &c. The third and fourth counts deſcribed one part of the bridge to be within the borough, and the other part to be within the pariſh of *Old Stratford*, in the ſame county; and were, in other reſpects, like the firſt and ſecond counts. The defendants pleaded not guilty.

At the trial before *Wood* B. at the laſt ſpring aſſizes at *Leiceſter*, examined copies of the charters of the 7 *Ed.* 6. and 16 *Car.* 2., after mentioned, were proved on the part of the proſecutor; and many witneſſes were alſo called, who proved that, as far back as living memory went, the corporation had always been accuſtomed

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to repair the bridge at their own expence; which bridge, it was admitted, stood partly in the borough, and partly in the parish of *Stratford*. It was then objected on the part of the defendants, 1st, that every count alleged an *immemorial* obligation on the corporation to repair; whereas it appeared by the charter of the 7 *Ed.* 6., that the inhabitants of the borough were then first incorporated; and consequently that the allegation was disproved. But the learned Judge thought that it might be inferred from that charter, that there had been from time immemorial a corporation under some denomination or other at *Stratford*, by whom the bridge had been repaired. 2dly, It was objected that the obligation to repair arose from a gift of lands, &c. made by that charter to the corporation, *in trust* to support and repair the bridge; and that their neglecting to do so, however it might be a breach of trust, for which a remedy lay in equity, was not indictable. This objection was also over-ruled: the learned Judge thinking that the lands might be a fund auxiliary to the support of the bridge, but not the creation of the obligation. And the same answer served to another objection, which was now stated to have been made at the trial, that the corporation were bound, if at all, ratione tenuræ. A verdict passed for the crown; but the points of law and evidence were reserved for the consideration of this Court, with leave to enter a verdict for the defendants, if either of the objections were thought to be well founded. A motion to that effect was accordingly made, and a rule nisi obtained in last *Easter* term, when the Court desired to be furnished with a copy of the material parts of the charter of *Edward* 6th, on which the questions made principally turned.

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King *Edward* 6th, by his charter, recites, that whereas the borough of *Stratford-upon-Avon*, in the county of *Warwick*, is an *ancient* borough, in which a certain guild was heretofore founded, and endowed with divers lands, tenements, and poſſeſſions, *out of the rents, revenues, and profits* whereof a certain *free grammar-ſchool* for the education of boys there was maintained and ſupported, and a certain *alms-houſe* there, conſiſting of 24 poor people therein to be kept, was likewiſe maintained and ſupported, and a certain *great ſtone bridge* called *Stratford-bridge*, built over the *Avon*, was from time to time *kept up and repaired*; which ſaid guild is now *diſſolved*, and the lands, tenements, and poſſeſſions thereof did lately come into our hands, and now are in our hands. And whereas *the inhabitants of the borough* of *Stratford* aforeſaid, *from time immemorial*, have had and enjoyed divers *franchiſes*, *liberties*, free cuſtoms, *juriſdictions*, privileges, exemptions, and immunities, *by reaſon and pretence of the aforeſaid guild, and by reaſon and pretence of charters, grants, and confirmations* of ancient time made by our progenitors to the maſters and brethren of the ſaid *guild*, and *otherwiſe*; *which the ſaid inhabitants of the ſaid borough cannot now hold and enjoy, for that the ſaid guild is diſſolved*, and for other cauſes now to us appearing; by means whereof it is likely that the *borough* aforeſaid, and *the government thereof*, will fall into a worſe ſtate from time to time if a remedy thereto is not ſpeedily provided: whereupon the *inhabitants* of the borough aforeſaid have humbly beſought us, that we would extend our grace and favour to them *for the bettering* of the aforeſaid borough and of *the government* thereof, *and for the ſupporting of the great charges which they from time to time are bound and ought to ſuſtain and perform*, and that we

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we would esteem them, the inhabitants, *worthy to be made, reduced, and erected into a body corporate and politic:* know ye, &c. And then the king proceeds to *grant* unto them, *the inhabitants of the borough of* Stratford-upon-Avon aforesaid, that the same borough shall be *a free borough for ever hereafter*, &c.: and then he proceeds to incorporate them by the name of the bailiff and burgesses of the borough, &c. The King afterwards *grants* that the said borough, and the circuit and precincts thereof, and *the jurisdiction* of the same, shall hereafter extend and reach, as well in length and breadth as in compass, *to such, the same, and the like bounds and limits*, as the said *borough* of *Stratford-upon-Avon*, and the *circuit and precinct of the same, and the jurisdiction thereof, from time immemorial*, or at any time afterwards or before, did extend to and reach. Then, after several clauses relative to the constitution of the borough, the king proceeds: — And know ye that we, willing that the said *alms-house* in the said borough should be hereafter maintained and supported, and that the *free grammar-school* there should be hereafter kept up and maintained, as heretofore it used to be, *and that the great charges of the borough aforesaid, and to the same borough and to the inhabitants thereof yearly and from time to time incident*, may be hereafter *the better sustained and supported*: therefore the king grants to the bailiff and burgesses all those his messuages, mills, lands, &c. chambers, halls, and tithes, &c. which were parcel of the possessions and revenues of the late guild of *Stratford-upon-Avon* now dissolved, as fully, freely, and entirely, and in as ample manner and form, as any the masters and brethren of the said late guild, &c. had held and enjoyed, or ought to have held and enjoyed; and as fully, freely, and entirely, and in

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as ample manner and form, as all and fingular the fame premifes came or ought to have come, and did then remain or ought to be in the king's hands by reafon of the act of the 1 *Ed.* 6. (*c.* 14.) for diffolving divers chantries, guilds, &c. The charter afterwards directs in what manner the *alms-houfe* and *free grammar-fchool* fhall be continued, but is filent as to the *bridge*. By a fubfequent charter of the 16 *Car.* 2., the new name and conftitution of mayor, aldermen, and burgeffes, was given to this corporation; and the former grant of lands, &c. was confirmed to them.

The Attorney-General and *Abbott* now fhewed caufe againft the rule, and contended that the evidence fufficiently proved that the corporation of *Stratford-upon-Avon*, under one or other name and form, had been immemorially liable, quà corporation, to repair the bridge, and were not merely chargeable at law ratione tenuræ, or in equity as truftees for applying a proportion of the profits of the lands granted by the charter of *Ed.* 6. It is often very difficult to difcover how a corporation originated in very early times, and to reconcile their ancient privileges and obligations with their more modern charters of incorporation: the Courts, therefore, have always laid hold of flight circumftances to connect the modern corporation with the ancient body politic, in order to fupport its prefcriptive claims; and it often happens, that the titles to many of its ancient privileges and eftates are only to be derived through that connexion. It was argued on behalf of the exifting corporation, that, prior to the charter of *Ed.* 6., the guild, therein mentioned to be then diffolved, had been the only corporate body in *Stratford-upon-Avon*; and that that charter fhewed that

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the guild were only liable to the repair of the bridge ratione tenuræ, or as truftees endowed for that and other purpofes. But it is rather to be collected from the general hiftory of guilds, that, though often feparately incorporated for fome fpecial purpofes, they only exifted as parts of fome more extended corporation in the fame place. So here it may be collected from the general words of the charter, that, *from time immemorial*, the inhabitants of the borough had enjoyed "*liberties, jurifdictions, privileges*, &c. *by reafon and pretence*, not merely of the guild, but "otherwife," that there was an ancient general corporation, as well as a guild, in this borough. The diffolution of the guild, therefore, out of whofe eftates, whether by charitable donation, by reafon of tenure, or of endowment in truft, the repair of the bridge and other public purpofes had been from time to time fuftained, would not affect the continuing liability of the corporation, if they had been immemorially bound, as fuch, to the repair: and the evidence given at the trial was, that, as far back as living memory could trace it, the corporation had always been accuftomed to repair the bridge: and this was primâ facie evidence that they were immemorially bound to do fo, unlefs it were fhewn by other evidence, either that they firft began to exift within time of legal memory, or that fome other body was, within that time, bound to the repair, or (what would alfo be a fufficient anfwer to this indictment,) that the corporation, if bound to repair at all, were only bound ratione tenuræ or as truftees. As to the latter character, in which refpect they would not, it had been faid, be indictable at all, but only anfwerable in a court of equity as for a breach of truft, if they did not repair; the corporation have never acted

or pretended to act as trustees in this respect, and there is no evidence whatever in support of the supposition. And as to their being bound ratione tenuræ; that is disproved by the very grant of the lands in the charter of *Ed. 6.*, which imposes on the corporation in respect of such grant, the obligation of sustaining the alms-house and free grammar-school, but is silent as to the bridge. Then the fair inference from the whole charter is that the ancient corporation, which existed before that charter, and which was enlarged and re-incorporated by it with others of the inhabitants at large, was before liable, quà corporation, to the repair of the bridge, though not to the sustentation of the alms-house and free grammar-school; though the guild, which appears to have had ample revenues, in addition to the other charitable purposes which it was probably bound to support, lent its aid to the corporation in support of the bridge. And that accounts for the provisions of the charter, that when the guild was dissolved, and its estates, then in the hands of the crown, were meant to be granted out again to the corporation, the crown imposed on the corporation the obligation of sustaining the alms-house and the free grammar-school, which the corporation were not before bound to do; and did not specify the obligation to repair the bridge, because that existed before: although in the recital of the charter, the latter is also mentioned as having been repaired by the ancient guild before its dissolution. It therefore rather assumes that the corporation were before liable to repair the bridge. But though the repair of the bridge be not imposed by that charter on the corporation, yet the king may be supposed to refer to it as one of "the great charges of the borough aforesaid "yearly and from time to time incident to it," for the better sustaining and supporting of which he was moved

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to grant thoſe eſtates to the corporation. [Lord *Ellenborough* C. J. If the obligation to repair the bridge were originally upon the corporation, this argument will be let in; but if it were upon the guild before its diſſolution, it will be difficult to ſhew how it was transferred to the corporation. And does it not appear by the charter, that the guild were originally liable?] The charter only ſhews that the revenues of the guild had been in fact applied in part to the repair of the bridge, but it does not ſtate that the guild were bound to repair it. It is indeed only ſtated that the guild had repaired it *out of their rents and profits*; which does not ſhew any obligation to repair it ratione tenuræ even in the guild: for thoſe who are bound to repair ratione tenuræ are ſo bound, not merely *out of rents and profits*, but at any rate, while they hold the eſtate, though the rents and profits were not ſufficient for the purpoſe; and they can only diſcharge themſelves by conveying away or ſurrendering the eſtate, from the tenure of which the obligation ariſes. But it is not inconſiſtent with the original liability of the parent corporation to the repair, that the guild might have had a grant of land, upon condition to apply the revenue of it to the repair of the bridge, in aid of the parent corporation. [*Bayley* J. May there not be another difficulty: ſuppoſing the lands were originally granted for the repair of the bridge, and that the guild, while they held thoſe lands, were liable ratione tenuræ: then, when the guild was diſſolved, and their eſtates were in the hands of the crown, would not the lands be ſtill liable in the hands of the crown; and, when granted out again to the corporation, would not the corporation be liable ratione tenuræ; which would account for their ſubſequent repairs of the bridge, as proved by the witneſſes within time of living memory?] The terms of

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the grant itself rather exclude their liability ratione tenuræ to repair the bridge, concerning which it is silent, while it enjoins the maintenance of the alms-house and free grammar-school: if liable, therefore, at all, it must be upon an original liability quà corporation, consistently with the terms of the charter and grant, and with the parol evidence. Besides, when land, originally granted by the crown upon such a tenure, reverts back to it, on failure of heirs or successors of the grantees, it does not follow that it reverts with the same burthen upon it as was imposed upon the grantees ratione tenuræ. [Lord *Ellenborough* C. J. Is there not a further difficulty from the words of the charter, in considering this as a corporation by prescription, when the words used seem rather to imply an original incorporation?] The words of ancient charters must always be construed with great latitude, from the uncertainty of their contemporaneous signification, and often from a loose generality of expression; more especially in cases where ancient privileges have been continued to be enjoyed, or ancient burthens borne, for which no authority is to be found in their modern charters, and which, therefore can only be supported by prescription (*a*). Possibly the charter of *Ed.* 6. may have enlarged the ancient corporation; the number of in-

(*a*) A corporation may be even so far dissolved, by the loss of one or more of its integral parts, as to be incapable of renewing itself; so that the crown may grant a new charter to the inhabitants of the same place: and yet if the crown think proper, it may revive and continue the old corporation by a new grant to the remaining members of the old dissolved and dormant corporation, together with other inhabitants of the place, so as to enable their successors to sue upon a bond given to it before such its dissolution. *The Mayor, &c. of Colchester* v. *Seaber*, 3 *Burr.* 1866., explained by *The King* v. *Pasmore*, 3 *Term Rep.* 199. 241. Lord *Coke* says, in the case of *Sutton* hospital, 10 *Rep.* 30. "that in old time the inhabitants or burgesses of a town or borough were incorporated when the king granted to them to have guildam mercatoriam." And 1 *Rol. Abr.* 513. cites the *Register* 219.

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habitants may have increased; and that would be consistent with the prayer of the inhabitants, stated in the charter, to be thought worthy of being incorporated. Words of creation are frequently found in old charters, where it is clear that there was a pre-existing corporation, though perhaps under a different name, or under a different constitution, as may have been the case here. [Lord *Ellenborough* C. J. Might not the *inhabitants* of the borough, as such, have been liable to the repair of the bridge, in like manner as the inhabitants of a parish or township have been held liable by immemorial custom (*a*): for the charter recites that the *inhabitants* of the borough had, upon the dissolution of the guild, whose revenues had been applied to the repair of the bridge, besought the king that he would extend his favour to them "for" (among other things) "the supporting of the great charges which *they*, from time to time, *were bound and ought to sustain and perform*, &c.] There is no evidence, either by parol, or by the recital of the charter, that the *inhabitants*, as such, had ever repaired the bridge; but all the evidence goes to shew, that the corporation have repaired it; and they can only be bound by prescription or tenure; and the latter mode is negatived by the charter.

B. Morice, contrà. The prosecutor was bound to prove two things in order to support this indictment; 1st, that the defendants were an *immemorial* corporation; and 2dly, that, as such, and not merely by reason of tenure, they were bound to repair, or, what is the same thing, to rebuild, if necessary, the bridge in question.

(*a*) Vide *Rex* v. *The Inhabitants of the W. R. of Yorkshire*, 5 *Burr.* 2594.

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In order to prove the firſt, the proſecutor gave in evidence the charter of *Ed.* 6.; which, if it did not even negative, at leaſt contained no affirmative prove of the fact. The queſtion was not whether, before that charter, there exiſted a body of perſons in the place with privileges and juriſdictions, or whether the *inhabitants* might not have enjoyed privileges "by reaſon and pretence of the *guild*, and of charters, grants, and confirmations before made *to the maſters and brethren of the ſaid guild*, or otherwiſe:" but the queſtion was, whether the preſent corporation had exiſtence before the charter, when the charter itſelf aſſumes to create them anew out of the *inhabitants*, whom alone it mentions, without any word of re-incorporation or confirmation. And as to the deſignation of the place as "an *ancient* borough," the words of the charter before mentioned plainly refer that to the diſſolved guild: and it is not pretended that the preſent corporation are the ſucceſſors of that guild. Then the prayer of the *inhabitants* is to be "*made, reduced, and erected* into a body corporate;" which are all words of new creation, and not of continuance or revival; and this, in a charter within time of memory. The charter ſhewed, however, without queſtion, that the guild had in fact repaired the bridge from time to time; from whence the preſumption is that they were bound to do ſo. But if, againſt that fact, it were open to preſume that any other body was liable to the repair, the fair preſumption would rather be againſt the *inhabitants* in general, than againſt the *corporation*; for it is the *inhabitants* of the borough whom the charter deſcribes as having immemorially enjoyed divers franchiſes, &c. and as requiring the king's favour "for the ſupporting of the great charges which *they*, from time to time, were bound and ought to ſuſtain and perform." The general pre-

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ſumption of law is that the county at large are bound to the repair of public bridges; and if any other deſcription of perſons be charged, the onus lies on the proſecutor to prove it diſtinctly; and certainly it cannot be thrown by preſcription upon a corporation appearing to be erected within time of memory. But, 2dly, if there were any evidence to bind the corporation at all to the burthen of repair, it is rather to be referred to their poſſeſſion of the lands of the ancient guild, than to any other ſource: for taking the whole of the evidence together, it amounts to this, that while the guild was in exiſtence and held the lands, the guild repaired the bridge; and ſince the lands have been granted to the corporation, the corporation have made the repairs. And though, upon the ſuppoſition that the corporation are liable ratione tenuræ, it will be difficult to account for the ſilence of the charter in this reſpect; yet the fair concluſion to be drawn from that omiſſion is that the corporation are not liable at all, and not that they are liable in their mere corporate capacity, without reference to tenure.

Lord ELLENBOROUGH C. J. The queſtion is whether the corporation is properly charged upon this record as being preſcriptively bound as ſuch corporation to repair the bridge? In order to maintain that, it muſt be proved that this body has had immemorial exiſtence; and no charter having been produced prior to that of *Ed.* 6. we muſt draw the beſt inference we can from that, which is the only light furniſhed to guide us, whether, before that charter, this was a preſcriptive corporation: and we muſt alſo be ſatiſfied that it is not liable, if at all, ratione tenuræ; becauſe, if liable only in that reſpect, and not having been ſo charged, this indictment would fail. Two things therefore are to be made out by the proſecutor; firſt, that the corpora-

corporation was an immemorial corporation at the time of the charter of *Ed.* 6.; and next, that it is liable as fuch, and not in refpect of the tenure of thofe lands which formerly belonged to the guild, and were granted out again by that charter to the corporation now fubfifting. Now, looking to the charter, every word of which is very important to the elucidation of thefe points; it begins with ftating that this is an "*ancient borough*:" that indeed does not ex vi termini import that it was a *prefcriptive* body, but it is pregnant evidence of it. Then it ftates that in this ancient borough a certain guild was theretofore founded, endowed with lands, out of the *rents and profits* of which a free grammar-fchool, an alms-houfe, and the great ftone bridge called *Stratford Bridge* were maintained and repaired. It does not predicate of the guild, that the lands had been granted to them upon condition, and that ratione tenuræ they were bound to maintain thefe things, but that they were maintained and repaired *out of the rents and profits*. But it is predicated of the inhabitants of this ancient borough that from time immemorial they had enjoyed "*franchifes* (*a*), liberties, free cuftoms, *jurifdictions*, privileges, exemptions, and immunities, by reafon and pretence of the guild, and of charters, grants, and confirmations to the guild, *and otherwife*; which the inhabitants could not then enjoy by reafon of the diffolution of the guild" If the corporation had a previous exiftence, thefe words would refer to them; the word *inhabitants* being a good corporate defcription (*b*): for how otherwife than as a corporation could the inhabitants have had *franchifes* and *jurifdictions*,

(*a*) *Franchifes*, (fays Lord *Holt* in *Rex* v. *The City of London*, *Skin.* 311. are not effential to a corporation, but *a privilege pertaining to it.*

(*b*) Vid. the Year-book 21 *Ed.* 4. 56 *a.* 59. *b.* and *Bro. Corporations*, *pl.* 65. and 54.; and 1 *Rol Abr* 513.

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rifdictions, which are expreffive of political authorities. To predicate therefore of a place that it was an *ancient* borough, the inhabitants of which were a body having *franchifes* and *jurifdictions* from *time immemorial*, is in effect to predicate of the body that they were a prefcriptive corporation; for how elfe could they have had thefe things from time immemorial. It further ftates that by reafon of the premifes, and for other caufes appearing, it was likely that the borough, and the *government* thereof, would fall into a worfe ftate from time to time if a remedy were not fpeedily provided: there then is another word importing fome kind of corporate government which was falling into decay fince it had been fevered from the guild, which nourifhed it in point of finance, and without which it had no funds for its fupport: not confidering however the *borough*, with its franchifes, jurifdictions, &c. and government, as then actually lapfed and diffolved by fuch feverance from its principal branch or right hand, but only as falling into decay without it. It then alludes to the *great charges* which the inhabitants of the borough were from time to time bound to fuftain and perform, which they had loft the means of doing by the lofs of the guild: after which follow the words creating the main doubt upon the fubject; importing, in their natural fenfe, a prayer of the inhabitants for a primitive incorporation; that is, that the king "would efteem them worthy to be *made, reduced, and erected* into a body corporate and politic." But I do not confider that thefe words are fo ftrong as to repel the inference to be drawn from the multiplied matters and terms in the charter importing a pre-exifting corporation. Perhaps the inhabitants might not confider it as a matter of any confequence that the crown fhould exprefsly recognize them in their then mutilated ftate,

as a corporation. The guild is exprefsly ftated to have been diffolved; but there can be no queftion that the diffolution of it, though of a diftinguifhed offspring, would not of itfelf have diffolved the parent corporation, affuming it to have had exiftence before the charter of *Ed.* 6. Then the king, after incorporating the inhabitants under the name and in the manner mentioned, affigns the fame *bounds* and *jurifdiction* to the borough as it had had "*from time immemorial*, or at any time afterwards." That is a direct defcription of an immemorial jurifdiction of known extent and limits, which is to be perpetuated in the new corporation. He then proceeds to grant to them the lands which had belonged to the guild; in doing which it feems to be taken for granted that the corporation pre-exifting had been liable to the repair of the bridge; for though that is one of the three objects to which the firft part of the charter recites that the rents and profits of the eftates held by the guild had been applied, of the benefit of which the inhabitants had been deprived by the diffolution of the guild; yet, when the crown grants out the lands again, no mention is made in terms of the repair of the bridge as one of the conditions of the grant, but only of the fupport of the almshoufe and free grammar-fchool: but it ftates generally, as a further reafon for making the grant, "that the *great charges of the borough aforefaid, and to the fame borough, and to the inhabitants thereof*, yearly, and from time to time *incident*, might be thereafter *the better fuftained and fupported.*" It ftates therefore that they were before liable to *great charges*: and when we find that as far back as living memory can reach, the bridge has always been maintained by this corporation, and is not fhewn to have been ever repaired by any other body; and when no

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mention is made in the charter that the guild were before chargeable with the repair by the tenure of their lands, though it is ſtated that they had in fact repaired it from time to time out of their rents and profits; and when the charter, in granting out the ſame lands to the corporation, expreſsly impoſes on them the other two obligations ſpecified, without mentioning this, though before mentioned in the firſt recital with the other two; but does allude generally to other great charges to which they were liable; what are we to ſuppoſe was meant by thoſe other great charges, but, amongſt others, that of the bridge, which the corporation are proved to have from time to time defrayed? It appears therefore upon the whole, from the expreſſions to which I have adverted concerning the franchiſes, juriſdictions, government, and known limits, enjoyed from time immemorial in this borough, which are repreſented as then likely to fall into decay without the aſſiſtance of the crown afforded by the charter of *Ed.* 6., that there was at that time a corporation by preſcription exiſting there. And though the king afterwards, in giving them a conſtitution under his charter, uſes words of creation; yet that may be conſidered only as ariſing ex abundanti cautelâ, in the mutilated ſtate to which they ſeem to have been reduced; for in the ſame charter he recognizes the inhabitants of the borough as immemorially entitled to franchiſes, juriſdictions, &c. And next, though the lands are expreſsly ſtated to be granted for other ſpecific purpoſes, they are not ſtated to be granted by the tenure of repairing the bridge: but other great charges are generally mentioned, to which they were before liable; and this is one which they are proved to have always borne as far back as living memory can go. The queſtion then is whether

whether there was not evidence on which the jury might find that the defendants are an immemorial corporation, and are liable, in their corporate character, to the repair of the bridge: and there appears to me to be very sufficient evidence by the charter and the parol testimony to sustain their conclusion: but it is enough to say that it is a case in which the judge would be warranted in telling the jury that there was a preponderance of evidence on the side of the verdict which has been found.

GROSE J. I have had considerable doubts upon this subject; but upon the whole it is better perhaps that the verdict should stand. In order to support this indictment it must appear that this is an immemorial corporation: that I think may be made out in the way which my Lord has put it. But my difficulty has been with respect to the body on whom the burthen was originally imposed; which I have been rather inclined to think was upon the guild: and therefore I pause in pronouncing my decided opinion upon the subject; not feeling myself however so clear upon this point as to warrant me in saying that the verdict should be set aside against the opinions entertained by my Lord and my Brothers. My doubt has arisen from the words of the charter, expressing that the bridge had been kept up and repaired from time to time out of the rents, revenues, and profits of lands with which the guild had been endowed; and the great probability from thence that the guild was before liable to the repair.

LE BLANC J. The inquiry into facts of such high antiquity as those in question is generally involved in considerable obscurity; and before we set aside this verdict

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we muſt ſee enough upon the evidence to ſatisfy us that the concluſion of the jury was wrong. It is clear that there had been a guild or corporation in this place, which was diſſolved at the time of granting the charter of *Ed. 6.*, and that charter alſo ſtates that the borough of *Stratford-upon-Avon* is an *ancient* borough, within which that guild was. It is alſo clear that the expreſſions in that charter do not ſimply denote a town with inhabitants, becauſe it refers to franchiſes, liberties, juriſdictions, &c., and alſo to certain charges which they were bound to ſuſtain and perform; which ſeems to carry the notion of their being a corporation. Then, comparing that with the parol evidence as to the conſtant practice of the corporation to repair the bridge from time to time, without any ſuch condition impoſed upon them by the charter in reſpect of the grant of lands, I cannot ſay that there is not ſufficient evidence upon the face of the charter, coupled with the conſtant practice of the corporation to bear the burthen of repair, to warrant the concluſion of the jury that this was a corporation by preſcription. But that is not enough to ſuſtain the verdict; becauſe, if the charge of repairing the bridge of right belonged formerly to the guild, and not to the corporation exiſting at the ſame time, this indictment could not be ſuſtained. The charter ſays that the alms-houſe, free grammar-ſchool, and bridge, were from time to time kept up and repaired by the guild out of the rents, revenues, and profits of their lands; and that by the diſſolution of the guild the inhabitants would be left liable to great burthens, which they were bound to bear; and then, for the ſupporting of thoſe great charges, it grants to the corporation the lands which the guild had had, and particularly enjoins them to keep up the alms-houſe

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and ſchool, without mentioning the bridge. Now, if the repair of the bridge had not been a burthen upon the corporation before, it was natural to ſuppoſe, from the previous recital, that the crown, in granting the lands to the corporation, would have particularly enjoined them to keep up the bridge as well as the alms-houſe and ſchool, all of which had been before enumerated as ſuſtained out of the rents, revenues, and profits of the guild. But it only ſays, that in order that the alms-houſe and free grammar-ſchool ſhould be maintained and ſupported, and that the *great charges to the borough and the inhabitants* thereof from time to time *incident* ſhould be *the better ſuſtained and ſupported*, the king grants the land. This includes every charge which the borough and its inhabitants were before liable to bear. Then as the corporation have always, as far back as living teſtimony can go, repaired the bridge, it carries a ſtrong probability that that was one of the charges to which the borough and its inhabitants, as a corporate body, were before liable, otherwiſe it would have been ſpecifically mentioned as well as the alms-houſe and ſchool, I think, therefore, that there was ſufficient to warrant the concluſions which the jury have drawn, that this was a corporation by preſcription, and that the burthen of repairing the bridge belonged to the corporation before the diſſolution of the guild.

BAYLEY J. I agree with my Lord and my Brother *Le Blanc* that there ought to be no new trial in this caſe. I do not profeſs to conſider it as a caſe free from doubt, but one involved in conſiderable difficulty; and I own my opinion has fluctuated a great deal in the courſe of the argument, and is now different from what it was

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at firſt. The parol evidence ſhews that the corporation has from time to time, when repairs were wanted for the bridge, borne all the expences of them: that raiſes a preſumption in the firſt inſtance that they were under an obligation to repair the bridge; and that could only ariſe from tenure or from preſcription. Then if there be not ſufficient evidence, by the production of the original grant of the lands, to throw the obligation upon them by tenure, that goes a great way to ſhew that they are liable by preſcription; or at leaſt the queſtion is left ſufficiently in ſuſpenſe to preclude us from ſaying that the verdict is wrong, and that the caſe ought to be ſent to a new trial. If the corporation be bound by tenure, the guild muſt alſo have been bound by tenure of the ſame lands: but the words of the charter do not imply that the guild was bound by tenure. It is ſaid indeed that the guild had from time to time kept up and repaired the bridge out of the rents, revenues, and profits of the lands; but it is not ſtated that they were bound by tenure. If the guild had received the lands which they held by endowment from the crown, on condition that the bridge ſhould be kept up and repaired by them, ſo that they were liable ratione tenuræ, I agree that when the lands reverted to the crown upon the diſſolution of the guild, the lands would be freed from the charge in the hands of the crown, and the crown muſt have renewed the obligation when it granted out the lands again to the corporation: but we find that the grant to the corporation is ſilent as to the repair of the bridge, though it enjoins the ſupport of the alms-houſe and ſchool: and therefore, unleſs the lands had remained liable to the charge in the hands of the crown, there is no new obligation created by the grant in reſpect of the bridge. I

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rather think, as the Attorney-General suggested in the argument, that the corporation might have been originally liable to the repair, and that the guild only applied a part of their revenues to this purpose in ease of the corporation. There is not enough then to satisfy my mind that the corporation are liable ratione tenuræ; and if not, they can only be made liable by prescription. And though words of creation be used in the charter of *Ed. 6.*, as if the crown were then first erecting a new corporation in *Stratford*; yet there are other words and expressions in the same charter which denote a pre-existing corporation in the place. The charter speaks of it as an "ancient borough," and as having *jurisdictions* from time immemorial; of having "franchises, liberties," &c.; and as being subject to *charges*. Therefore, notwithstanding the words of creation as a new corporation, yet there are other words from which the existence of an ancient and immemorial corporation in the borough, independent of the guild, may be inferred, and there is no word which negatives that inference. And as there is nothing to shew that the corporation are chargeable ratione tenuræ, and there is evidence to shew that this is an immemorial corporation; there does not appear to be enough of doubt in the case to send it to a new trial.

Rule discharged.

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Tuesday, July 2d.

Doe, Lessee of Wall, *against* Langlands.

A testator, possessed of real and personal property, after several pecuniary legacies, "gave "and bequeathed all "and every the "residue of "his *property*, "goods and "chattels to be "divided "equally between *A.* and "*B.*, share and "share alike, "after all his "debts paid:" and in fact the personalty was not quite sufficient to pay all the debts and legacies: but held that the word *property*, though thus followed by *goods and chattels*, was sufficient of itself to carry the realty.

THIS ejectment was brought to recover possession of an undivided moiety of two messuages in the parish of *St. George in the East*, in *Middlesex*, and the plaintiff recovered a verdict at the sittings at *Westminster*, before Lord *Ellenborough* C. J., subject to the opinion of the Court upon this case.

Thomas Doran, being seised in fee of the premises in question, by his will dated 24th of *July* 1808 and duly executed, (after giving several pecuniary legacies,) bequeathed to Mrs. *Brown*, his sister, 10*l.*; and then bequeathed as follows: "To *Rosey Doran* and *Edward* "*Wall* I give and bequeath all and every the residue of "my *property*, *goods*, *and chattels*, to be divided equally "between them, share and share alike, after all my "debts are paid." And he appointed Mr. *Short* and *P. Delany*, executors; the latter of whom prepared the will. The personal estate of the testator was worth 400*l.*, which was not sufficient, by 70*l.*, to pay all his debts and legacies. Mrs. *Brown* and *Rosey Doran* were sisters and heirs at law of the testator. The testator left no widow, or child, or brother. *Edward Wall*, (the lessor of the plaintiff,) one of the residuary devisees, was the testator's cousin. The will contained no other words concerning the property of the testator, except those before mentioned. If the plaintiff were entitled to recover, the verdict was to stand: if not, a verdict was to be entered for the defendant.

This

This case was argued in last *Easter* term by *Comyn* for the plaintiff, and *Storks* for the defendant; and the argument turned upon the meaning of the word *property* in the will; whether, coupled as it was with the words *goods* and *chattels*, it was sufficient to pass the fee in the messuages in question to *Rosey Doran* and *Edward Wall*. For the plaintiff were cited several cases where the word *estate* (*a*) was held to pass the fee; and *Doe* v. *Lainchbury* (*b*), where the word *property*, though coupled with "money, stock, and effects," was held equally comprehensive. And the case of *Roe* v. *Yeud* (*c*) was said to be distinguishable from this, on account of the subsequent enumeration of the several species of *personal property*, of which the testator was possessed, and which alone he seemed to have had in his contemplation by the devise of the remainder of his property. For the defendant, the last-mentioned case was principally relied on, as shewing that the word *property*, when coupled with other words indicative of personal property only, is not sufficient to pass the fee. Conformable to which was the opinion of Lord Chancellor *Cowper*, in *Cliffe* v. *Gibbons* (*d*), even where the devise was of all a man's "*estate*, goods, and chattels:" and of Lord *Hardwicke*, in *Timewell* v. *Perkins* (*e*), and in *Bailis* v. *Gale* (*f*). And this was also likened to *Camfield* v. *Gilbert* (*g*), where a devise of the residue of

(*a*) See most of the earlier cases on this point collected in Mr. *Cox*'s note to the case of *Barry* v. *Edgeworth*, 2 *P. Wms.* 523, 5., with the addition afterwards of *Macaree* v. *Tall*, *Ambl.* 181. *Stiles* v. *Walford*, 2 *Blac. Rep* 938. *Holdfast* v. *Marten*, 1 *Term Rep.* 411. *Fletcher* v. *Smiton*, 2 *Term Rep.* 656.; and *Doe* v *Chapman*, 1 *H. Blac.* 223. And see further *Doe* v. *Woodhouse*, 4 *Term Rep.* 89. *Roe* v. *Wright*, 7 *East*, 259. and *Barnes* v. *Patch*, 8 *Ves. jun.* 604.

(*b*) 11 *East*, 290. And see also *Doe* v. *Roper*, *ib.* 518. to the same effect.

(*c*) 2 *New Rep.* 214. (*d*) 2 *Ld. Ray.* 1326. (*e*) 2 *Atk.* 102.
(*f*) 2 *Ves.* 51. (*g*) 3 *East*, 516.

effects,

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effects, after a partial disposition of real and personal estate, was held not to carry *real* effects.

The Court took time to consider the case; and now,

Lord ELLENBOROUGH C. J. delivered the judgment of the Court (after stating the case).

The only question on this case was whether by the words, "all and every the residue of my *property*, goods, and chattels," these freehold messuages passed? If they passed by these words, the plaintiff is entitled to recover: if not, a verdict is to be entered for the defendant. That *property* is a term sufficient to pass real estate, when used in a last will, is not disputed; and the the question is whether the generality of its signification be restrained by any other words in the same instrument, or whether from the whole texture of the will, or from any particular clauses in it, an intention in the testator to use it in a more confined sense can be made appear. The argument, on the part of the defendant, chiefly rested on the want of any introductory words, expressing an intention to dispose of every thing the testator had; on the prior bequests in the will, being of mere pecuniary legacies; and on the word *property* being immediately followed by words of mere strict personal property, viz. *goods and chattels*: which it was contended restrained the generality of the term *property* before used. And the late case in the court of Common Pleas of *Roe, ex d. Helling*, v. *Yeud*, 2 *New Rep.* 214., was relied on as in point. Very little inference of intention can be drawn from mere formal words of introduction; though we certainly find them in some cases called in aid to shew that a man did not mean to die intestate as to any part of his property; and the making a will at all may also be

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used as affording such an inference. In *Huxtep* v. *Broeman*, 1 *Brown's Ch. Ca.* 437. there were no introductory words, nor any expression in the will pointing at the real estate; and yet the words, "I give and bequeath all I am worth, except 30*l.*," were held to pass real estate. And surely "all and every my property," or "the residue of my property," is as comprehensive as "all I am worth." This brings it to the question, which is the material one in the case, whether the words immediately following the word *property* are descriptive of the kind of property the testator intended to give; the same as if he had said, "*namely* or *viz.* my goods and chattels;" which would have confined it to that species of property. But we do not feel ourselves warranted in so reading them. The more obvious and natural sense is that they are to be taken cumulativè, that is, as property, *and* goods and chattels. And we think this case distinguishable from *Roe, d. Helling,* v. *Yeud*, in C. B., where the bequest was to five persons whom the testator made his executors, and where the enumeration at the end of his will was very particular, and was considered by the Court as incapable of meaning any thing but an enumeration of what the testator supposed to be included in his bequest. The clause in that case specified goods, stock, bills, bonds, book-debts, securities, and funded property: and if it were so incapable of being understood otherwise than as enumerating what he meant to include in his expression of *property*, (and which that Court appears to have thought,) the conclusion was necessary, that personal property only could pass. The words in this case do not seem to us as requiring any such limited construction of the word *property* before used,

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and therefore we think the two messuages passed to the devisees. The consequence is that the postea must be delivered to the plaintiff.

Tuesday, July 2d.

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If a neutral *American ship*, insured here, be captured by a *French* ship, and condemned in a *French* Court as *prize*, upon the express ground stated in the sentence of condemnation, (which is evidence for this purpose,) that the ship was not properly documented according to the existing treaty between *France* and the United States of *America*, (conjointly with the suppression of papers by the captain after the capture; on which no opinion was given by the Court;) the neutral assured cannot recover their loss against the *British* underwriter, although there was no warranty or representation that the ship was *American*; the neglect of the ship owners themselves, who are bound at their peril to provide proper national documents for their ship, being in such a case the efficient cause of the loss. Neither can the agent of the assured, some of whom were also interested in the cargo as well as the ship, recover for the loss of the cargo insured, which was also condemned at the same time and for the same reason; such assured of the goods being implicated in the same neglect in their character of ship-owners. But it is otherwise in the case of a mere assured of *goods*, who is not answerable for the proper documenting of the *ship*, without a warranty or representation of her national character.

THIS was an action by the assured against an underwriter, on a policy of assurance effected by the plaintiffs on the *ship* Eliza, at and from *Virginia* to a market in *Holland* or *Germany*, with leave to touch at or off *Falmouth* for orders, and also with liberty in that voyage to proceed to any port or places whatsoever, to seek, join, and exchange convoy, *to take papers and clearances* for any ports or places whatsoever, at a premium of 12 guineas per cent., with various returns. The policy stated the insurance to be *on ship* valued at 4050*l.*, *on freight* valued at 3000*l.*, and on certain *goods* specified at different valuations, and on other goods. The declaration stated that the ship sailed upon the voyage insured with the specified cargo. In one count, *Bell*, *Cumming*, and *C.* and *F. Whittle* and *Morgan*, were alleged to be interested in the ship and freight; and *Bell*, *Cumming*, and *C.* and *F. Whittle* in the cargo, to the amount insured; and in another count the interest in ship, freight, and cargo, was laid generally in *Bell*, *Cumming*, and *C.*

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and *F. Whittle.* The declaration further averred that the ship and cargo were totally lost *by capture* in the course of the voyage, and that the assured had expended a large sum in endeavouring to recover them. At the trial before Lord *Ellenborough* C. J. at *Guildhall*, a verdict was found for the plaintiffs for 304*l.* 7*s.*. subject to the opinion of the Court on the following case.

The policy was effected by the plaintiffs as agents for *Bell*, *Cumming*, *C.* and *F. Whittle*, and *Morgan*, who are citizens of the United States of *America*, and were interested in the ship, freight, and cargo, as averred in the declaration. These persons all resided within the United States of *America* at the time when the insurance was effected, and have continued to reside there ever since. *No warranty or representation was made to the defendant that the ship or cargo were* American; but both the *ship* and *cargo* were *American* in point of fact. The ship sailed from *Norfolk* in *Virginia* on the 10th of *July* 1809, with a cargo of the description mentioned in the policy, and on the 10th of *August* following was captured off *Plymouth* by the *French* privateer *Jean Bart*, and carried into *Brehat*; and the *ship and cargo* were afterwards *condemned* by a sentence of the Imperial Council of Prizes at *Paris*; the same being a court of competent jurisdiction on this subject. In the narrative part of that sentence it is stated that there was found on board the said ship, among other papers, the following. A *passport*, in four languages, in the usual form, dated at *Norfolk*, 27th *June* 1809, signed by the president of the U. S. countersigned, and sealed; stating *Norfolk* to be the place of departure, and *Tonningen* the place of destination. It states, as do all the other passports, "that, prior "to the departure, the captain shall make oath that the

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" ſhip belongs to none but citizens of the U. S., and " that the act of ſuch affidavit ſhall be written at foot " thereof; the form whereof is in ſubſtance printed " thereunder: *the blanks are filled up with the hand, but* " *it is neither ſigned nor ſealed.*" The ſentence goes on to allege that the following amongſt other reaſons for confiſcation preſented itſelf in the memorials. " The " paſſport expreſſes that the captain is to make oath, " previous to her departure, that the ſhip belongs to " citizens of the U. S., and that this act is to be written " underneath the paſſport. Now the form of this affi- " davit, it is true, is printed according to cuſtom; the " blanks are even filled up with writing; but there is " neither ſeal nor ſignature thereto. It is, *therefore, a* " *nonentity*, and *the paſſport, which neceſſarily ſuppoſes it, is* " *likewiſe of no value.* According to the convention of " the 8th *Vendemaire*, 9th year, an *American* captain " who ſhall have loſt his paſſport is permitted to ſupply " that defect by other proofs of neutrality; but here it " is not the caſe. *Jacob Vickery* is furniſhed with a paſſ- " port, *which the public officer has refuſed to ſign, no doubt* " *becauſe the nationality of the captain, or that of the owners,* " *did not appear to him ſufficiently ſubſtantiated.* The " paſſport, therefore, has continued to be nothing more " than a form; it is deſtitute of that which ought to " complete it; and the captain has navigated *without a* " *paſſport.* This is what the Council decided on the " 16th *Thermidor*, 8th year, in confiſcating the prize " made by the privateer the *Spartiate*, of the *American* " ſhip the *Republican*, which had a paſſport in which " the affidavit was not ſigned." After further ſtating the proces verbal and other proceedings that had been had, the ſentence proceeds *to condemn the ſhip and cargo* in

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in the following terms. " Whereas it appears by the " pleadings, that Captain *Jacob Vickery*, while at ſea, " took ſome papers out of his trunk previous to his " going aboard the privateer, and delivered them to " the ſecond mate, who has, ſince his arrival at *Brehat*, " cauſed them to be returned to the captain. That " this fact is corroborated by *John Thomas*, chief mate, " and by *William Barker* and *John Robinſon*, ſeamen; " and that theſe papers having never ſince re-appeared, " no doubt remains but they have been withdrawn, and " that there is the greater reaſon to apply, with all its " ſeverity, the third article of the regulation of the 26th " *July* 1778. That the denial of the ſecond mate, to " whom the papers were given, and the tergiverſations " of the captain, conſtitute a ſufficient proof that, if " they had come to light, they would have betrayed " the prize. That in truth the captain (although contra- " dicting himſelf in his interrogatory and in his decla- " ration before the council) pretended that the papers, " by him given at ſea to his ſecond mate, were no others " than the ſecond ſet of papers for *Amſterdam*, which, " on the 12th of *Auguſt*, the day of their entry into " *Brehat Roads*, he had, in the preſence of ſeveral per- " ſons, delivered to the officer of police, and which were " added to the package containing the papers which the " privateer had taken poſſeſſion of. But the contrary is " evident, as well from the verbal proceſs, which was " very minutely drawn up at the time of their arrival at " *Brehat*, on the 12th and 13th of *Auguſt*, by the officer of " police, who alone acted; as from the certificate delivered " by the ſame officer on the 16th of *January* laſt, which " proves, in the moſt formal manner, that the package " of ſhip's papers, which, at the time of the inventory

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" being drawn up, comprifed the *Amfterdam* papers, was " opened a fhort time after their arrival at *Brehat*, but " there being no interpreter prefent that could give a " defcription thereof, it was fealed up with the feal of " Captain *Vickery* and that of the mayoralty, and that no " papers were inclofed therein befides thofe found on " its being opened. *Whereas alfo the affidavit*, the form " whereof is at foot of the paffport of the prefident of " the U. S., *not being furnifhed with any fignature, it* " *follows that the paffport does not fulfil the conditions re-* " *quired by the convention of the* 8*th* Vendemaire, 9*th year*, " *in order to make it valid, and that therefore it ought to* " *be confidered as of no effect*; which, together with the " circumftances of the withdrawing the papers, involves " the confifcation of the prize, and renders it unneceffary " to enter into the merits of the other charges brought " by the captors concerning the navigation of the *Eliza*. " Our Council decides that *the capture* made by the " privateer, the *Jean Bart*, of the fhip *Eliza*, under " *American* colours, carried into *Brehat*, is *good and* " *lawful*; and therefore adjudges to the owner and " crew of the faid privateer as well the faid fhip as the " goods of her loading; the whole to be fold in manner " and form prefcribed by the laws and regulations con- " cerning prizes, and the neat proceeds to be paid over to " the faid owner and crew."

By the fourth article of the convention between the *French* Republic and the U. S. of *America*, concluded at *Paris* the 30th of *September* 1800, it is provided as follows: " Property captured and not yet definitively condemned, or which may be captured before the exchange of ratifications, (contraband goods deftined to an enemy's port excepted) fhall be mutually reftored on the

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the following proofs of ownerſhip, viz. the proof on both ſides, with reſpect to merchant ſhips, whether armed or unarmed, ſhall be a paſſport in the form following. To all who ſhall ſee theſe preſents greeting: It is hereby made known, that leave and permiſſion has been given to , maſter and commander of the ſhip called , of the town of , burthen tons or thereabouts, lying at preſent in the port and haven of , and bound for , and laden with . After that his ſhip has been viſited and before ſailing, he ſhall make oath before the officers who have the juriſdiction of maritime affairs, that the ſaid ſhip belongs to one or more of the ſubjects of , the act whereof ſhall be put at the end of theſe preſents. As likewiſe that he will keep and cauſe to be kept, by his crew on board, the marine ordinances and regulations, and enter in the proper office a liſt ſigned and witneſſed, containing the names and ſurnames, the places of birth and abode of the crew of his ſhip, and of all who ſhall embark on board her, whom he ſhall not take on board without the knowledge and permiſſion of the officers of marine. And in every port or haven where he ſhall enter with his ſhip, he ſhall ſhew this preſent leave to the officers and judges of the marine, and ſhall give a faithful account to them of what paſſed and what was done during his voyage; and he ſhall carry the colours, arms, and enſigns of the *French* Republic (or of the United States) during his voyage. In witneſs whereof we have ſigned theſe preſents, and put the ſeals of our arms thereunto, and cauſed the ſame to be counterſigned by at , the day of , anno domini . And the paſſport will be ſuf-

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ficient without any other paper; any ordinance to the contrary notwithstanding: which passport shall not be deemed requisite to have been renewed or recalled, whatever number of voyages the said ship may have made, unless she shall have returned home within the space of a year. Proof with respect to the cargo shall be certificates, containing the several particulars of the cargo, the place whence the ship sailed, and whither she is bound: so that the forbidden and contraband goods may be distinguished by the certificates; which certificates shall have been made out by the officers of the place whence the ship set sail, in the accustomed form of the country. And if such passports or certificates, or both, shall have been destroyed by accident or taken away by force, their deficiency may be supplied by such other proofs of ownership as are admissible by the general usage of nations. By the 17th article of the said convention it is provided that, when one party shall be engaged in war, and the other party shall be neutral, the ships of the neutral party shall be furnished with passports similar to that described in the 4th article, that it may appear thereby that the ships really belong to the citizens of the neutral party: and that, if the ships be laden, they shall be provided not only with the passports abovementioned, but also with certificates similar to those described in the same article; so that it may be known whether they carry any contraband goods. By an additional article inserted previous to the ratification, it was agreed that this convention should be in force *for the term of* 8 *years from the time of exchange of ratifications.* The convention, with this additional article, was ratified by the President of the U. S., and by the First Consul of the *French* Republic; and the ratifications were exchanged

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changed at *Paris* on the 31st *July* 1801. By an arrêt for the regulation of the *French* marine, dated 26th *July* 1778, article 3, referred to in the above sentence of condemnation, it is declared that all vessels with their cargoes, whether neutral or allied, from which any papers have been thrown into the sea, suppressed, or abstracted, shall be declared good *prize*, upon proof that papers have been thrown into the sea, without enquiring what those papers were, or by whom thrown, and though sufficient remain to prove that the ship and cargo belonged to friends or allies. If this Court were of opinion that the plaintiffs were entitled to recover, the verdict was to stand: otherwise, a nonsuit was to be entered.

J. W. Warren, on a former day in this term, argued for the plaintiffs, the assured, that the underwriter could not avail himself of either of the grounds of condemnation stated in the sentence; the suppression of papers by the captain after the capture, against a *French* ordinance, to which the *American* government was no party; or the want of a sufficient passport, in the form required by the treaty between *France* and the U. S. of *America*. [He said that he did not know whether the defendant's counsel meant to rely on the first ground: on which *Campbell*, for the defendant, said, that he felt the second ground of objection to be so strong for his client, that he should not trouble the Court with any argument upon the first] On the second ground, he said, that the question whether, in the absence of any express warranty or representation of the national character of a ship insured, there was an implied warranty that she should be navigated according to treaties between her own government and

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and other states, was discussed but not decided in *Price* v. *Bell* (*a*). But it was afterwards expressly decided in *Dawson* v. *Atty* (*b*), that the assured of *goods* was not bound to look to the ship being properly documented, without a warranty of her national character: and the principle of that case, he said, extended to this, where the nationality of the ship was neither warranted in the policy, nor represented to the underwriter at the time of his subscription. He then denied that there was an implied warranty, that a ship insured should be properly documented according to the treaties of her nation with foreign powers. It is a question depending upon the intention of the parties to the contract, and nothing can be implied in a contract beyond its terms, except what is of the essence of it. Now nothing is of the essence of a contract of marine insurance, except those things without which the ship would be at all events incapable of performing her voyage; such as sea-worthiness, and men and furniture *necessary* for the voyage; which are conditions precedent: but not any thing, the want of which only goes to increase the risk; as was said by *Lawrence* J. in *Christie* v. *Secretan* (*c*). [*Le Blanc* J. The breach of an implied warranty would protect the underwriter, though the loss happened from another cause: but though the proper documenting of the ship were not a condition precedent or an implied warranty, yet if the loss happened from the want of that which the assured themselves ought to have provided, could it be within the intention of the parties to the contract, that the underwriters should be liable for a loss occasioned by the default of the assured themselves.] Wherever the underwriter means to avail

(*a*) 1 *East*, 663. (*b*) 7 *East*, 367. (*c*) 8 *Term Rep.* 198.

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himself of the superior protection afforded by the character of a neutral ship, the constant experience of the mercantile world shews that he requires a warranty of it; and in consequence of such a warranty, he receives a smaller premium: the absence of such a warranty, therefore, which is of very frequent occurrence in insurances, shews that the underwriter prefers taking the greater risk with the larger premium: the risk, therefore, of capture, and condemnation, for want of proper documents, is one which the underwriter, not having required a warranty of them, must be considered to have contemplated and taken upon himself. *Christie* v. *Secretan* (a) was the first case in which any intimation is to be found of an implied warranty, that the ship should be documented according to her national treaties; but the Court were not all agreed upon that point, which was only collateral to the judgment; and so far as that was applied to an insurance on goods, the contrary was afterwards ruled in *Dawson* v. *Atty*. He further contended, that there was no necessity for the *American* ship to be documented at all in the manner required, as stated in the sentence of condemnation; for the treaty itself between *France* and the U. S. of *America*, which stipulated for the particular form of the passport, alleged in the sentence to be informal, was only to be in force for 8 years from the exchange of ratifications, which took place at *Paris* on the 31st of *July* 1801; the treaty therefore expired on the 31st of *July* 1809; whereas the capture was not till the 10th of *August* following, when no such passport was necessary: and the sentence does not profess to consider the duration of the treaty, but merely the provisions

(a) 8 *Term Rep.* 192.

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contained in it; which at that time could at most have no other force than a mere *French* ordinance, to which *America* was no party: and it was held in *Pollard* v. *Bell* (*a*), *Bird* v. *Appleton* (*b*), and *Price* v. *Bell* (*c*), that the breach of mere *French* ordinances requiring certain formalities in ship documents beyond what were recognized by treaties, on the ground of which foreign ships were condemned as prize by the *French* courts, was no bar to the recovery of the assured on policies on such foreign ships made here. At all events, he contended that the plaintiffs were entitled to recover on the amount of the *goods* insured, upon the express authority of *Dawson* v. *Atty*. By the 4th article of the treaty between *France* and *America*, the proof required of the ownership of a ship is the *passport*, the existence of which, in the form prescribed by the treaty, is negatived by the sentence of condemnation: but the proof required of ownership of *goods* is a *certificate*, the existence of which is not negatived by the sentence; and therefore the assured is not concluded by it, as to the goods.

Campbell, contrà, contended, first, that the sentence of condemnation stated a clear infraction of a treaty between *France* and *America*, of the existence and duration of which the Prize Court were competent judges, and their adjudication upon the matter is final and conclusive between these parties; according to the express decision of this Court upon a similar question in *Baring* v. *The Royal Exchange Assurance Company* (*d*). Though the period first assigned to the treaty had expired at the time of the capture, yet it might have been prolonged by an-

(*a*) 8 *Term Rep.* 434. (*b*) *Ib.* 562.
(*c*) 1 *East*, 663. (*d*) 5 *East*, 99.

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other convention, and this Court would presume that it was so, if necessary to support the sentence. But it is clear that the ship sailed before the treaty had expired, and the proper documenting of a ship must refer to the original sailing from her own port. [Lord *Ellenborough* C. J. inquired how the treaty was worded in that respect; and was referred to the form of the passport set out in the 4th article.] It must have been so considered in *Rich* v. *Parker* (*a*), where the assured of ship and goods, warranted *American*, failed in his action against the underwriter for want of such a passport at her first sailing, though she took it on board before she was captured, and produced it at the time to the commander of the *French* privateer. [Lord *Ellenborough* C. J. That being the case of a warranty of the national character of the ship, the warranty would of course cover the voyage from its commencement: but this not being the case of a warranty, the only question can be, whether the assured, by their own act, occasioned their own loss.] The foreign sentence says that they did, and is conclusive of the fact. He then contended, 2dly, that there was either an implied warranty in every policy of insurance, that the treaties which bound the ship of the particular nation with others should be observed at all events: or 3dly, that where, as in this case, the very cause of the loss was the want of proper national documents, which it was the duty of the ship-owners to have provided, that was such gross negligence in them, that they could not recover against the underwriters. It is the duty of the assured to do all that lies on him to secure the thing insured, and the underwriter only insures against fortui-

(*a*) 7 *Term Rep.* 705.

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tous losses, against which the assured cannot provide. *Pothier*, *ch.* 1. *art.* 2. *s.* 3. On principles of natural justice the insurer can in no case make himself liable for the default of the assured; for that would lead to fraud. Warranties and representations are only necessary where the underwriter would limit his general risk: and in the case of a warranty broken, he may protect himself against a loss by any casualty. In those cases, too, the onus probandi is thrown on the assured to shew the warranty complied with; whereas it lies on the underwriter to shew that the loss happened by the breach of an implied warranty. There is always an implied warranty of sea-worthiness, by which the assured engages that the ship shall be "rendered as secure as possible from capture by the enemy, as well as from the danger of winds and waves" (*a*); and for any original deficiency of the ship in that respect, the underwriter may protect himself against losses by other perils; yet such deficiency only enhances the risk more or less; for a ship not sea-worthy, in the proper and general sense of the word, might yet be able to perform the voyage with a continuance of favourable weather. There is an implied warranty in every policy, not only that the ship itself shall be sea-worthy, but that she should be furnished with every thing necessary for the purpose of safe and careful navigation during the voyage; a sufficient crew, and a captain and pilot of competent skill (*b*). The same principle applies to the proper documenting of a ship accord-

(*a*) This was quoted from the report of Lord *Ellenborough*'s summing up in *Wedderburn* v. *Bell*, 1 *Camp. N. P. Cas.* 1.; and in *Park*, 304.: but Lord *Ellenborough* C. J. observed that by the words *as secure as possible* must only be understood *reasonably secure*.

(*b*) *Law* v. *Hollingworth*, 7 *Term Rep.* 100. *Park*, 301.; and *Farmer* v. *Legge*, 7 *Term Rep.* 186.; and he also cited *Hubner*, vol. 1. part 2. s. 1.

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ing to her national character, the want of which renders her navigation equally insecure from capture and detention, as the other requisites do from winds and waves. *Roccus* (note, 98.) says that, if a ship be seized for want of a passport, which she ought to have had, it discharges the underwriter. And in a case in Chancery (*a*), Lord Commissioner *Hutchins* said "that a policy of insurance against restraint of princes extends not where the insured shall navigate against the law of countries," &c. In a late case of *Steele* v. *Lacy*, *M.* 51 *G.* 3. in C. B., which was an action on a policy on a ship from a port in *Great Britain* to *Riga* and back again; the ship was not warranted, but only represented to be *American*; and having been met by a *British* cruizer in the course of her voyage, who demanded her passport, which she refused, was thereupon brought into port and condemned: and the Court held that, as she was bound to carry a passport, and did not produce it when demanded, it was a good cause of condemnation, and therefore the assured could not recover. By the 18th article of the treaty between *France* and *America*, an *American* ship is bound, if met with at sea by a *French* ship of war or privateer, to shew her passport: and in *Rich* v. *Parker* (*b*), where the ship was warranted *American*, Lord *Kenyon* said that the warranty was not satisfied by merely shewing that in fact the ship was *American* property; but the underwriter was not to be liable to any inconvenience or impediment in her voyage, from her not being in the condition required by the treaty with *France*: and it certainly enhances the peril of the voyage for the ship to be subject to be detained and taken into port for want of a passport, though she may not be finally condemned. Here, then, at

(*a*) *Anon.* 2 *Vern.* 176. (*b*) 7 *Term Rep.* 709.

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at all events was groſs negligence in the aſſured, in not providing their ſhip with a paſſport, which it was their duty to have done; and in conſeqnence of their own negligence the loſs has been ſuſtained. This is not, therefore, like the caſe of a condemnation for the breach of mere *French* ordinances, which the *American* aſſured might know nothing of, and were no parties to; but they were parties to the treaty made by their own government. If an act of Congreſs had required every *American* ſhip to have ſuch a document on board upon pain of confiſcation, and for want of it this ſhip had been ſeized and confiſcated by the *American* government; no doubt the underwriter would have been diſcharged, upon the principle of the caſes on the *American* embargo (*a*). He then relied upon the ſtrong opinions thrown out by Lord *Kenyon* and *Groſe* J. in *Chriſtie* v. *Secretan* (*b*), as to the diſcharge of the underwriter where a loſs happens by the negligence of the aſſured in not having their ſhip properly documented; though he admitted that the judgment proceeded upon another ground. In *Price* v. *Bell* (*c*), though it is ſaid that there appeared to be a difference of opinion on the bench reſpecting the queſtion, whether there was an implied warranty that a ſhip ſhould be properly documented; yet *Lawrence* J., who inclined to the negative, went no further than to ſay that it did not follow, becauſe a foreign aſſured might, for his own protection, procure ſhip-papers required by the laws of his own country, therefore the underwriters here could avail themſelves of his not having them, *where the loſs was not attributable to that*

(*a*) *Conway* v. *Gray*, &c. 10 *Eaſt*, 536.; and ſee *Livie* v. *Janſon*, 12 *Eaſt*, 648.

(*b*) 8 *Term Rep.* 192. (*c*) 1 *Eaſt*, 663. 673. 9.

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cause. It appears from thence that, in a case like the present, he would have agreed with the rest of the Court, that the assured were not entitled to recover. The case of *Dawson* v. *Atty* (a) affords no contradiction to the former cases; for that was the case of a policy on *goods*, the *British* owner of which had no concern in the *American* ship, and therefore could not be guilty of any negligence in not procuring her to be properly documented. He was no party to the treaty between *Spain* and *America*, which required the certificate, the want of which occasioned the condemnation by the *Spaniards*, and probably did not know of it. The case of *Bowden* v. *Vaughan* (b) went on the same principle of distinction, upon the effect of a representation to the underwriters as to the time of sailing of a ship, as made by the ship-owner, and as made by the owner of goods on board; the latter of whom was held not to be concluded by it, if he made the representation bonâ fide upon probable expectation. These arguments apply as well to the insurance on the *goods* as on the *ship*: all the parties interested in the goods were also interested in the ship; it was one entire contract, and must stand or fall together.

J. W. Warren, in reply, maintained, upon the authority of *Christie* v. *Secretan* (c), that the Court could only look to the sentence of condemnation for the cause of the loss, which was there stated to be by capture as prize. But if they will look further, as to the reason of the condemnation as prize; which was for the alleged breach of a particular treaty; they will also notice that the treaty had expired before the ship was questioned as to her documents and captured: and the subjects of *America* were

(a) 7 *East*, 367. (b) 10 *East*, 416. (c) 8 *Term Rep.* 192.

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then no longer parties to any ſtipulation requiring the paſſport to be authenticated in the way ſtated. But ſuppoſing the fact as to the exiſtence of the treaty to be concluded by the ſentence; and admitting that, if the loſs were attributable to the groſs negligence of the aſſured, they could not recover; yet here there was no groſs negligence, but a mere clerical error: there was a paſſport as required by the treaty, and there was an affidavit of the captain as to the property in the ſhip being *American*: but the *American* port-officer had omitted to ſign and ſeal the affidavit; which was a mere ſlip of form, and no juſt cauſe of condemnation; as, in one of the caſes, a refuſal to produce ſhip-papers when lawfully demanded by a belligerent; which was contrary to the law of nations. Other caſes, ſuch as *Law* v. *Hollingworth*, went upon the ground of the violation of our own laws by the aſſured, which is clearly diſtinguiſhable from the preſent caſe. Then as to the diſtinction inſiſted on between the ſhip-owner and the owner of goods, to get rid of the application of *Dawſon* v. *Atty*; the captain is as much the adopted ſervant of the latter, as he is the appointed ſervant of the ſhip-owner; and the one ſhould be no more affected by his negligence than the other. It might as well have been ſaid in that caſe, that the owner of the goods was bound to ſee that the ſhip was properly documented before he truſted his goods on board.

Lord Ellenborough C. J. then ſaid that it was not from any doubt which he entertained upon the preſent queſtion that he wiſhed to look further into the caſes which had been cited, before the Court delivered their opinion upon this caſe; but from a deſire to avoid uſing expreſſions unneceſſarily, which might be conſidered as claſhing with other caſes, he thought it more adviſable to take

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further time for consideration. Towards the end of the term his Lordship delivered the judgment of the Court.

This was an insurance upon the ship *Eliza*, her freight and goods, effected by the plaintiffs as agents for certain citizens of *America*, the proprietors thereof, in whom the interest in these three several subjects of insurance was averred in the declaration to be. There was no warranty or representation made to the defendant, that the ship or cargo was *American*; though they were so in point of fact. The ship was captured in the course of her voyage by the *Jean Bart*, a *French* privateer, and condemned by the Imperial Council of Prizes at *Paris*. A passport is stated to have been found on board the ship, but that there was neither seal or signature to the affidavit underneath such passport, as required by the treaty between *France* and *America*. The sentence, reciting that, "Whereas the affidavit, the form whereof "is at the foot of the passport of the president of the "United States, not being furnished with any signature, "it follows that the passport does not fulfil the condi-"tions required by the convention of the 8th *Vende-"maire*, 9th year, in order to make it valid; and that "therefore it ought to be considered as of no effect; "which, together with the circumstance of the with-"drawing the papers, involves the confiscation of the "prize, and renders it unnecessary to enter into the me-"rits of the other charges brought by the captors con-"cerning the navigation of the ship *Eliza*: our Council "decides, that *the capture* made by the privateer (the "*Jean Bart*) of the ship *Eliza*, under *American* colours, "carried into *Brehat*, *is good and lawful*; and proceeds "to adjudge the ship, goods, &c. to be sold in manner

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"and form prescribed by the regulations concerning "*prizes*," &c. This is unquestionably such an adjudication of the *capture* of the property assured *as prize*, as primâ facie entitles the plaintiff to recover as for a loss by capture within the terms of his policy. But as the sentence is in our opinion equally to be regarded, as evidence of the facts inducing the condemnation, and upon which the condemnation proceeds, as of the judicial act of condemnation itself, it is material to look at the alleged ground of condemnation, in order to see whether it has been occasioned by any act or neglect on the part of the assured; for if it has been so occasioned, it would not be a loss against which the assured would, upon any principle of reason or justice as applied to this species of contract, be required to indemnify him: the indemnity stipulated on his part being only against the perils described in the policy, as far as they operate upon the property insured adversely, and not through the medium of any act or neglect *on the part of the assured himself*, producing the loss of the property insured. In the present case, (laying out of our consideration the subtraction of the papers, solely because the defendant's counsel, relying on the other objection being in his favour, has chosen expressly to renounce relying in argument on such subtraction as a competent ground of condemnation,) the nullity of passport from the defects stated as belonging to it, and to which the underwriter's objection is confined, is the circumstance immediately inducing the condemnation in question, and for which the owner is responsible; and that, whether the want of this document arose from his own default, or from that of his captain; inasmuch as there is no count for barratry in this declaration, nor any evidence suggested to support it, if there had been such a

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count. But it is said, inasmuch as there was no warranty or representation of the ship being *American* in this case, that upon the authority of *Dawson and Another* v. *Atty*, 7 *East*, 367., and in conformity to the principle of our decision in that case, we are bound to hold the want of proper documents (required by the treaty between *France* and *America*) to be immaterial. But it will be recollected that this was laid down in the case of an insurance upon *goods*; where the owner of goods has no concern in the obtaining of the proper documents with which the vessel is to be furnished for her voyage: and if that which is laid down as said by me at nisi prius in p. 367. of that case, be so qualified, viz. by a reference to the insurance as being *on goods*, nothing will be found which will even colourably be at variance with what is held by us on the present occasion. In p. 368. of that case I am reported as having said, with the concurrence of the other judges, " that, as the ship was not repre-" sented to be *American* at the time when the insurance " was effected, the assured was not bound by it; and " there being no undertaking in the policy itself that she " was an *American*, there was no necessity for her being " documented as such." This is also true with reference to a policy such as that was, *on goods*. But in a policy *on ship*, (and this whether there is a warranty or representation respecting the nation to which a ship belongs or not,) as the ship-owner is bound to have such documents as are required by treaties with particular nations on board, to evince his neutrality in respect to such nations; the want of them in the event of capture, and when the production of them becomes necessary, is most material. But in respect to a ship which is not the object either of representation or warranty, the existence of

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ſuch papers *at the commencement* of the voyage, (which in *Rich* v. *Parker*, 7 *Term Rep.* 705., were held neceſſary to a warranted ſhip,) or the want of them at any other time or for any other purpoſe but the one above ſpecified, is immaterial. In *Chriſtie* v. *Secretan*, 8 *Term Rep.* 192., it might be ſufficient to ſuſtain the judgment as given in favour of the plaintiffs, to ſay that that was alſo the caſe of an inſurance on *goods*, without warranty or repreſentation as to the nation of the ſhip; and that in ſuch caſe the aſſured, the owner of *goods*, was not liable to ſuffer in reſpect of his inſurance, on account of any defect in the documents belonging to the *ſhip*, with the procurement or exiſtence of which he had no concern: but the judgment certainly reſts upon a different foundation; indeed upon one which (according to the opinion we have intimated, viz. that the alleged grounds of a foreign ſentence, as well as the ſentence itſelf, are to be looked to,) muſt be deemed by us more queſtionable. In reſpect to the caſe now before us, upon the ſingle ground which has been already ſuggeſted, namely, that the three ſubjects of inſurance, ſhip, goods, and freight, all of them belonging to nearly the ſame *American* proprietors, were condemned on account of the common default of all the proprietors *in their joint character of ſhip-owners*, in not having a regular paſſport on board, as required by the treaty of their own ſtate with *France*, we are of opinion that the plaintiffs, the aſſured, cannot claim from the underwriter an indemnity for a loſs thus occaſioned by themſelves; and conſequently that in this caſe a nonſuit is to be entered.

The KING *against* The Justices of KENT.

Tuesday, July 2d.

The stat. 16 *Car.* 1. *c.* 4. *f.* 2. having continued the stat. 1 *Jac.* 1. *c* 6, the 2d and 3d sections of which last mentioned statute, in extension of the stat. 5 *Eliz.* *c.* 4., authorizes the justices in sessions (with the sheriff, if he conveniently may,) to rate the wages of *any labourers, &c. or workmen whatsoever, &c.*; this Court granted a mandamus to the justices, &c. of *Kent* to hear an application of the journeymen millers of that county, praying them to make such a rate; which application the justices had refused to hear upon the merits; considering that they had no jurisdiction over other than the wages of servants in husbandry.

A Petition was presented to the justices of *Kent* at their general quarter sessions in *January* last, from certain persons stating themselves to be millers in that county, and "within the description of millers mentioned in the stat. 5 *Eliz.* *c.* 4.;" which petition stated in substance that the wages paid to them for many years past by their respective employers never exceeded and often fell short of one guinea a week: that their day-work was long, and sometimes they were also obliged to work in the night; and that by reason of the great increase which had of late years taken place in the price of the necessaries of life, their wages were become wholly inadequate to their support and maintenance; and that not less than 4*s.* 6*d.* a day, with a proportionate allowance for extra work, would suffice for that purpose: and concluding with a prayer (in the relative terms of the section of the 15th section of the stat. 5 *Eliz.* *c.* 4.) "that you the said justices or the more part of you, "and the said sheriff (if you the said sheriff conve-"niently may,) will, at the general sessions first to be "holden and kept in and for the said county after *Easter* "now next ensuing, or at some time convenient within "six weeks next following the said Feast of *Easter*, as-"semble yourselves together; and being so assembled, "and calling unto you such discreet and grave persons "of the said county as you shall think meet; and con-"ferring together respecting the plenty or scarcity of "the time, and other circumstances necessarily to be "con-

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" confidered (*a*); that you will limit unto and appoint " the wages of millers in the county aforefaid, according to the form of the ftatute in that cafe made and " provided."

This application of the journeymen millers was fupported by counfel at the laft *Eafter* feffions; and was then oppofed by counfel on behalf of the mafter millers, principally, as it feemed, on the ground that the ftatute of *Elizabeth* was confined, if not in the terms of it, yet by conftruction and in practice, to the wages of labourers in hufbandry; and this as well fince the act of the 1 *Jac.* 1. *c.* 6. as before. And the Seffions finally refufed to act upon the petition, upon the ground, as it now appeared to the Court, that they had no jurifdiction to interfere in the cafe of thefe petitioners; and not upon the refult of a difcretionary judgment formed upon the fubject-matter of the petition.

Whereupon *The Attorney-General* (and *Gurney*) applied in the laft term for a mandamus to the juftices of *Kent*, " commanding them, together with the fheriff of the fame county, if conveniently he may, purfuant to the ftatute in fuch cafe made and provided, to hear and de-

(*a*) Here the words following in the ftatute are " *fhall have authority* " by virtue thereof, within the limits and precincts of their feveral com- " miffions, to limit, rate, and appoint the wages, as well of fuch and " fo many of the faid artificers, handycraftfmen, hufbandmen, or any " other labourer, fervant, or workman, *whofe wages in time paft hath* " *been by any law or ftatute rated or appointed* (1); as alfo the wages of " *all other labourers, artificers, workmen, or apprentices of hufbandry, which* " *have not been rated*, as they, the fame juftices, &c. fhall think meet by " their difcretions to be rated, limited, or appointed," &c.

(1) See various ftatutes on this fubject under titles Artificers and Labourers, in the Index to the *Statutes at large*.

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termine upon the application of certain millers of the ſaid county, for them the ſaid keepers of the peace and juſtices to limit, rate, and appoint the wages of millers in the ſaid county.' And the Court were referred to the following caſes upon the ſubject: *Snape* v. *Dowſe*, *Comb.* 3. *R.* v. *Champion*, *Carth.* 156. *Q.* v. *London*, 2 *Salk.* 442., 3 *Salk.* 260., and 6 *Mod.* 204. *R.* v. *Grogory*, 2 *Salk.* 484. *Q.* v. *Corbett*, 3 *Salk.* 261. *R.* v. *Pope*, 5 *Mod.* 419. *Q.* v. *Gouche*, 2 *Ld. Raym.* 820. *R.* v. *Helling*, 1 *Stra.* 8. and *Shergold* v. *Holloway*, 2 *Stra.* 1002.; and 4 *Com. Dig.* 554. *tit. Juſtices of the Peace*, (B) 60., &c.

Lord ELLENBOROUGH C. J. then ſaid that if the juſtices had rejected the application in the exerciſe of the diſcretion veſted in them by the legiſlature, this Court would not interfere; but if they had rejected it on the ground now ſtated, that they had no power to grant it, the Court would interfere ſo far as to ſet the juriſdiction of the magiſtrates in motion, by directing them to hear and determine upon the application. The Court therefore granted a rule to ſhew cauſe, &c.

Park, *Taddy*, and *Berens*, now ſhewed cauſe againſt the rule; and firſt ſaid that the juſtices in ſeſſions had heard the application made by counſel on the part of the journeymen millers; but they alſo admitted that the counſel who oppoſed it had inſiſted that by the conſtruction which had been put upon the act of *Elizabeth*, the diſcretion of the magiſtrates in the aſſeſſment of wages was confined to labourers and ſervants in huſbandry; and that the Seſſions had on that ground rejected the application. [Upon which Lord *Ellenborough* C. J. obſerved, that it was evident that the magiſtrates had never exer-

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ciſed their diſcretion at all upon the queſtion, whether the application was fit to be granted, or not; but appeared to have conſidered that they had no juriſdiction to hear it; therefore they could not be ſaid to have already *heard* the application.] They then contended that the conſideration of the rate of wages was a matter which the legiſlature intended ſhould move entirely from the juſtices themſelves in the ſpontaneous exerciſe of their own diſcretion; but that no perſon could call upon them, as a matter of right, to hear ſuch an application. But principally they relied on ſeveral caſes, where it had been held that the ſtat. 5 *Eliz.* only extended to give the juſtices authority to ſettle the wages of ſervants in huſbandry; within which deſcription the preſent applicants did not bring themſelves. And they added that the policy of the ſtate was againſt the extenſion of ſuch a power, which placed the ignorant and the idle upon a level with the expert and induſtrious. The caſes referred to were *The King* v. *Gregory* (*a*), *The Queen* v. *London* (*b*), *The King* v. *The Inhabitants of Halcott* (*c*), and *The King* v. *Devall* (*d*). [Lord *Ellenborough* C. J. It might have been doubtful upon the ſtat. of the 5 *Eliz.* c. 4.: but what doubt can there be as to the general power of the juſtices in this matter upon the ſtat. 1 *Jac.* 1. *c.* 6.] They admitted the generality of the words in the ſtatute of *James* extending the power of the juſtices to affix the rates of wages of any labourers

(*a*) *Hil.* 10 *W.* 3. 2 *Salk.* 484, 5.

(*b*) *T.* 3 *Ann. ib.* 442.; and 6 *Mod.* 204. Theſe were caſes of orders to enforce the *payment* of wages to individual labourers.

(*c*) 6 *Term Rep.* 583. That was a queſtion of ſettlement, and turned on the authority of an order of a juſtice for diſcharging a ſervant (not ſtated to be in huſbandry) from her maſter's ſervice.

(*d*) 3 *Keb.* 626.

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and workmen whatsoever: but observed, notwithstanding, that no notice appears to have been taken of it in any of the subsequent cases; and suggested that as the act was only temporary in the first instance, and the last continuance of it was by the stat. 16 *Car.* 1. *c.* 4. *s.* 2., there might, from the period at which the last act passed, have been a doubt whether the original statute had been continued by a competent authority (*a*).

Lord ELLENBOROUGH C. J. I cannot see what ground there can be for the doubt suggested as to the efficacy of the stat. 16 *Car.* 1. *c.* 4. *s.* 2. for continuing the stat.

(*a*) This and other acts which are classed with it in *Runnington*'s edition of the *Statutes*, as passed in the 16 *Car.* 2. were passed in the Long Parliament, which met at *Westminster* on the 3d of *November* 1640, in the 16 *Car.* 1., who began his reign on the 27th of *March* 1625. The order in which the Statutes were then classed by chapters is entirely arbitrary, and gives no clue to the period of the session when any particular act was passed. Chapter 1. is for preventing of inconveniences by the long intermission of parliament. This is recognized indeed, but in terms of strong reprobation by the stat. 16 *Car.* 2. *c.* 1. Chap 2. is the first "act for the relief of his majesty's army, and the northern parts of the kingdom;" and Chap. 3. is for "the reforming of some things mistaken" in the last mentioned act. The clause in question stands next as *s.* 2. in Chap. 4. (the rest of the act being expired and omitted) under the title of "An act for the *further* relief of his majesty's army and the northern parts of the kingdom." The first act for abbreviating *Michaelmas* term stands as Chap 6. It is remarkable, however, that when *Michaelmas* term was further abbreviated by the stat 24 *Geo.* 2. *c.* 48. no kind of notice is taken in it of the former statute, though several of its provisions are repeated verbatim. The statute for abolishing the Court of Star Chamber, which was passed in 1641, stands as Chap. 10. The next in order, (Chap. 11.) repeals the stat 1 *Eliz.* *c.* 1. concerning commissioners for causes ecclesiastical; and this repealing law is recognized by the stat. 13 *Car.* 2. *st.* 1. *c.* 12. as a law passed in the 17 *Car.* 1. If the order of the chapters denoted the relative period of enactment, this would be decisive. All the acts stated in *Runnington*'s edition, as of the 16 *Car.* 1., which are stated at large, (and, I presume, all inclusive to Chap. 37.) are passed in the name of the king: the greater part of them, however, were temporary, and are marked as expired laws: but there is this reference to Chap. 33. "See an act for the settlement of *Ireland*, passed in that kingdom anno 14 *Car.* 2. 1662., by which this and the following acts concerning *Ireland* are, besides their expiration, of no force."

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1 *Jac.* 1. There are several statutes placed subsequent to this in the printed statute books, of the force of which there is no doubt; such as the statute for shortening *Michaelmas* term, and the statute for the abolition of the Court of Star Chamber: and taking the statute of *James* 1. to be a subsisting law, the words of it are large enough to include the persons now applying. We do not however, by granting this mandamus, at all interfere with the exercise of that discretion which the legislature meant to confide to the justices of the peace in sessions: we only say that they have a discretion to exercise; and therefore they must hear the application: but, having heard it, it rests entirely with them to act or not upon it as they think fit.

GROSE J. agreed.

LE BLANC J. We only say that the justices have authority to act upon the subject-matter of the application; and that they are to hear it, and then to determine whether in their discretion they think proper to fix a rate of wages.

BAYLEY J. We tell the justices that they have authority by law to settle a rate of wages for the persons applying: but we do not say that they are to exercise that authority in this instance. Let them hear the application.

Rule absolute (*a*).

The Attorney-General, *Garrow*, *Gurney*, and *Andrews*, were to have supported the rule.

(*a*) The Justices of *Kent*, as I was afterwards informed, heard the application, but refused to make any rate.

HANBURY *against* GUEST.

Tuesday, July 2d.

Leave given to the plaintiff in debt on bond conditioned to perform an award, after judgment for him upon a plea of judgment recovered, to execute a writ of inquiry upon the stat. 8 & 9 *W.* 3. *c.* 11. *f.* 8. after a writ of error allowed, and to sign a new judgment, on the terms of paying costs, and putting the defendant in statu quo, &c.

RICHARDSON moved that the plaintiff might be at liberty to execute a writ of inquiry, notwithstanding a writ of error brought and pending. He stated that this was an action upon a bond with a condition to perform an award, which condition was set out in the declaration, and breaches assigned with damages pursuant to the stat. 8 & 9 *W.* 3. *c.* 11. *f.* 8. The defendant pleaded a judgment recovered; but for default of proving the record, judgment had been given against him; upon which he brought the writ of error. This motion was grounded upon the consideration that, without a writ of inquiry executed, (the statute being compulsory (*a*) in that respect,) the judgment obtained by the plaintiff would be unavailing, though it were confirmed upon the writ of error. And that, if the writ of error were permitted to suspend the plaintiff's proceeding to assess his damages upon the writ of inquiry, and enter up final judgment thereupon, there might be two writs of error upon the same record; the one upon the judgment already obtained, and the other upon the final judgment after the execution of the writ of inquiry for the assessment of damages.

The Court, after some consideration, granted a rule to shew cause; observing, that it appeared upon the face of the record, that there must be a writ of inquiry executed before the plaintiff could be entitled to the fruits of his judgment. And afterwards the rule was made absolute, (with the con-

(*a*) See *Walcot* v. *Goulding*, 8 *Term-Rep.* 126., and several prior and subsequent cases.

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sent of *Cowley* for the defendant,) that the plaintiff should be at liberty to execute a writ of inquiry, notwithstanding the writ of error allowed, and also to sign a new judgment, on payment of costs, to be taxed by the Master; the plaintiff agreeing that the defendant should be in the same situation with respect to his writ of error; and that the plaintiff would pay the necessary expence, if any, of placing him in that situation, and the costs of this application.

Wednesday, July 3d.

The KING *against* DE YONGE.

The exchanging guineas for Bank-notes, taking the guineas in such exchange at a higher value than they were current for by the king's proclamation, is not an offence against the stat. 5 & 6 *Ed.* 6. *c.* 19.

THIS indictment charged that the defendant, not regarding the laws and statutes of this realm, &c. on the 26th of *December*, 50 *Geo.* 3., with force and arms, at the parish of *St. Botolph*, *Aldgate*, &c. in *London*, unlawfully did *exchange* certain *coined gold* of this realm, i. e. 50 pieces of gold coin of this realm called *guineas*, of the value of 52*l.* 10*s.*, with one *Jesnatius Call*, receiving of and from the said *J. C.* then and there *more in value, benefit, profit, and advantage, for the said gold coin so exchanged*, i. e. for the said 50 pieces of gold coin of this realm called guineas, *than the same is declared by a certain proclamation* of his late majesty King *George* 1. given at his court at *St. James's*, under his great seal, the 22d of *December* 1717, to be current for within this his majesty's realm, and other his dominions; i. e. two *promissory notes of the Governor and Company of the Bank of* England, called Bank-notes, for the payment of the sum of 10*l.* each, and of the value of 10*l.* each; two other promissory notes of the said Governor and Company, called Bank-notes, for the payment of the sum of 5*l.* each,

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5*l.* each, and of the value of 5*l.* each; seven other promissory notes of the said Governor and Company, called Bank-notes, for the payment of the sum of 2*l.* each, and of the value of 2*l.* each; and twelve other promissory notes of the said Governor and Company, called Bank-notes, for the payment of the sum of 1*l.* each, and of the value of 1*l.* each; *and one piece of silver coin, called a dollar, of the value of 5 shillings*; in contempt of the king, &c. and against the form of the statute in that case made. There were other counts to the like effect; one stating that the Bank-notes and dollar taken by the defendant in exchange for the 50 guineas amounted to 3*l.* 15*s.* more in value, benefit, profit, and advantage for such gold coin of the realm than the same is declared by the aforesaid proclamation of *Geo.* 1. to be current for within the realm: another, that the defendant received from *J. C.* 1*s.* 6*d.* more in value, &c. for each guinea than the same was declared to be current for by the proclamation; and stating the value of the Bank-notes and dollar exchanged against the 50 guineas to have been altogether of the value of 56*l.* 5*s.*

After conviction at the trial before Lord *Ellenborough* C. J., in *London*, after *Trinity* term 1810, and a motion in arrest of judgment, made by *Marryat* in the *Michaelmas* term following, on the ground that the facts charged in the indictment constituted no offence either against the stat. 5 & 6 *Ed.* 6. *c.* 19. or any other statute, or at common law; the case was adjourned into the Exchequer Chamber, to be debated before all the Judges. It was accordingly argued there, by *the Attorney-General* for the prosecution, and by *Marryat* for the defendant; and a similar question, in the case of *The King* v. *Wright*,

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was alfo argued there by *Beſt* for the profecution, and *King* for the defendant. The arguments of the learned counfel have been already publiſhed by one of them (*a*), and therefore it is fufficient to refer to that authentic publication for the grounds on which the cafe was argued by them. And now,

Lord Ellenborough C. J. delivered the judgment of the Court in this cafe.

This was the cafe of a conviction upon an indictment tried before me at the fittings in *London* after laft *Trinity* term, on which judgment was in the *Michaelmas* term following ftayed, by order of this Court, upon a queftion of law referved by me for the determination of this Court, upon the motion of Mr. *Marryat*; and as it appeared that a fimilar point had occurred before, and had been referved by the Lord Chief Juftice of the Common Pleas, in the cafe of *The King* v. *Samuel Wright*, at the *Buckingham* affizes in the fummer of laft year, for the opinion of all the Judges; it was thought fit by us that this cafe fhould alfo be referred to the fame opinion of all the Judges, upon argument to be had before them in the Exchequer Chamber. Both cafes have been fince folemnly argued at feveral times before the Judges, three of whom were abfent from indifpofition at different periods in the courfe of the feveral arguments; but I am not aware that any of them differ in the refult from the other Judges who were prefent at the laft argument, and which took place upon this cafe of *The King* v. *De Yonge*. The offence charged in different counts of this indictment was *the exchanging certain coined gold of this kingdom,*

(*a*) See the "Report of the Cafes of *The King* v. *Wright*, and *The King* v. *De Yonge*," by Mr *King*.

that

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that is to say, 50 pieces of gold coin of this kingdom called guineas, of the value of 52l. 10s., with a person of the name of Call, *and receiving from such person more in value, benefit, profit, and advantage for the said coined gold so exchanged, than the same was declared, by a proclamation of his late majesty king* George *the first to be current for.* The exchange was stated in the indictment to have been made of these guineas *for certain promissory notes of the Governor and Company of the Bank of* England, *together with one piece of silver coin called a dollar.* In the result, all the Judges present at the last argument were of opinion, that the exchange described on this record, i. e. of guineas for Bank-notes, taking the guineas in such exchange at an higher value than they were current for by the king's proclamation, was not an offence against the 5 & 6 *Ed.* 6., upon which the indictment was founded. The consequence of this opinion of the Judges is, that the judgment in this case of *The King* v. *De Yonge*, depending in this court, ought to be arrested; and it is therefore by us arrested accordingly.

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Wednesday, July 3d.

The King *against* Webb, Barber, Townshend, Parkes, Ledsam, Warner, Pritchet, and Goddington.

A great number of persons at *Birmingham*, (2500) admitting of an extension to 20,000, covenanted by a deed of copartnership to raise a large capital (20,000*l.*) by small subscriptions of 1*l.* for each share, for the purpose of buying corn, grinding it, making bread, and dealing in and distributing flour or bread amongst the partners, under the name and firm of *The* Birmingham *Flour and Bread Company*; and under the management of a committee; and covenanted that no partner should hold more than 20 shares, unless the same should come to him by marriage, &c. or act of law; and that each member should weekly purchase of the copartnership a certain quantity of bread or flour, not exceeding 1*s.* in value, for each share, as the committee should appoint; and that no partner should assign his share, unless the assignee should enter into covenant with the other partners for the performance of all covenants in the original deed; and that the majority of partners at a public meeting might make by-laws to bind the whole.

And upon an indictment against several of the partners, charging them, *upon the stat.* 6 *G.* 1. *c.* 18. *s.* 18 *and* 19., as for a public nusance, with intending to prejudice and aggrieve divers of the king's subjects in their trade and commerce, under false pretences of the public good, by subscribing, collecting, and raising, and also by *making subscriptions* towards raising a large sum for establishing a new and unlawful *undertaking*, *tending to the common grievance*, &c. of great numbers of the king's subjects in their trade and commerce, *i. e.* making subscriptions towards raising 20,000*l.* in 20,000 shares, for the purpose of buying corn, and grinding and making it into flour and bread, and dealing in and distributing the same; and also with presuming *to act as a corporate body*, and pretending *to raise a transferable and assignable stock*. for the same purposes;

The jury having found specially, that the company was originally, (during the high price of provisions) instituted from *laudable motives*, *and for the purpose of more regularly supplying the town of* B *and the neighbourhood with flour and bread*, and that the same *was originally*, *and still is beneficial to the inhabitants at large*, but is (*i e.* at the time of finding the special verdict, which does not include the time of the offence charged in the indictment) prejudicial to the bakers and millers of the town and neighbourhood in their trades:

The Court gave judgment for the defendants, considering the case not to be within the stat 6 *G.* 1. *c.* 18 *s* 18 & 19., on which the indictment was framed. For,

1st, The *fact* of any nusance is negatived by the special verdict, *during the time to which the offences charged* relate.

2dly, Though the defendants are found to have raised a large capital by small subscriptions, which is one ingredient of a nusance mentioned in the act; *i. e.* where referable to undertakings prohibited by the act; and though the shares were made transferable *to a certain extent*, (*but to a certain extent only*,) *i. e.* upon the vendee's entering into similar covenants with the original partners, which may be another ingredient of a nusance in the act; and though the defendants have assumed certain equivocal indicia of a corporation, *i. e.* the taking a common name (though this was not found by the jury,) having a managing committee, general meetings, and a power to make by-laws; yet all these things being done *for the purpose of buying corn and making it into flour and bread for the supply of the partners*; which does not, upon the face of it, appear to be a dangerous and mischievous undertaking, tending to the common grievance, &c. nor is found in fact so to be; and not being one of the specific nusances prohibited by the statute; namely, the acting or pretending to act as a body corporate; the raising or pretending to raise transferable stock; (even if that be a nusance per se within the act, without reference to the nature of the undertaking;) the transferring or pretending to transfer any shares in such stock without authority by statute; the acting or pretending to act under any charter granted for special and different purposes by persons using such charter for raising or transferring stock; or so acting under any obsolete charter, become void or voidable by non user, abuser, or for want of election; it is not within the terms and intent of the nusances created by that statute.

THIS was an indictment found at the Quarter Sessions in *Warwickshire*, and afterwards removed into this court by certiorari. The indictment contained eight counts;

counts; upon the first, third, and fourth (*a*) of which the defendants were acquitted at the trial. The second stated that the defendants, contriving and intending to prejudice and aggrieve divers subjects of the King in their trade and commerce, under false pretences for the public good, after the 24th of *June* 1720, to wit, on the 1st of *August* 1808, at *Aston*, near *Birmingham*, in the county of *Warwick*, did, according to their own device and scheme, *make subscriptions towards* raising a great sum of money for establishing and setting on foot a certain new and unlawful *undertaking tending to the common grievance, prejudice, and inconvenience* of great numbers of the King's subjects in their trade and commerce; that is to say, did make subscriptions towards raising a sum not exceeding 20,000*l.*, to be divided into more than 20,000 parts or shares, *for the purpose of buying corn, grinding the same, making bread*, and dealing in or *distributing of flour and bread*, and for other purposes unknown; which undertaking was a public undertaking, and did then and there and still doth relate to affairs in which the trade, commerce, and welfare of great numbers of the King's subjects were and are concerned; to wit, at, &c. *to the common nusance* of all the King's subjects, against the form of the statute, and against the peace, &c. The 5th count charged that the defendants *subscribed towards collecting and raising by subscription* a great sum of money not exceeding 20,000*l.* to be divided into not more than 20,000 shares, for the purpose of assisting and favouring a certain other *new and unlawful un-*

(*a*) The first count charged that the defendants *opened a book for public* subscriptions, and drew in many unwary persons to subscribe therein towards raising a great sum of money, &c. The 3d was for taking such subscriptions; and the 4th was for exciting persons to subscribe.

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dertaking tending to the common grievance, &c. (as before) and did then and there pay upon such subscription certain small sums, amounting in the whole to a large sum, to wit, 30*l.*; which last undertaking was a public undertaking, &c. (as before). The 6th count charged that the defendants *presumed to act as if they were a corporate body,* and *pretended to raise a transferrable and assignable stock,* without any legal authority, and without any charter from the crown for so doing; that is to say, *as a corporate body, for the purpose of buying corn, grinding the same, making bread, and dealing in or distributing of flour and bread,* and for other purposes unknown; and having a number of *shares* not exceeding 20,000, *transferrable and assignable* by and from the holders of such shares to any other person or persons at the pleasure of the holders thereof; *to the common nusance* of all the King's subjects, &c. against the form of the statute, &c. and against the peace, &c. The 7th count charged that the defendants, without any legal authority, and without any charter from the crown for so doing, pretended *to raise a transferrable stock* to a large amount, to wit, not exceeding 20,000*l.*, to be divided into not more than 20,000 shares, *which shares were to be and are transferrable and assignable* from the holders thereof to any other person or persons at the pleasure of such holders; *to the common nusance,* &c. and against the statute, &c. The 8th count charged that the defendants, contriving and intending as aforesaid, did, according to their own device and scheme, further countenance and proceed in a certain other *new and unlawful undertaking, tending to the common grievance, prejudice, and inconvenience* of great numbers of the King's subjects in their trade and commerce; that is to say, an undertaking for the purpose

†1 of

of buying corn, &c. (as before); which laſt was a public undertaking, and did then and there and ſtill doth relate to affairs in which the trade, commerce, and welfare of great numbers of the King's ſubjects were and are concerned; to wit, at *Aſton*, &c. *to the common nuſance*, &c., againſt the form of the ſtatute, &c, and againſt the peace, &c.

Upon theſe ſeveral counts the jury found a ſpecial verdict, which ſtated in ſubſtance, that *Birmingham*, in the county of *Warwick*, is a large and populous town, inhabited by many perſons employed as labourers and workmen in divers manufactories carried on there; and that in the year 1796, the price of bread having riſen to a very great and extraordinary height throughout the kingdom, a deed poll, dated 22d of *September* in that year, was executed by the defendants (*Barber*, *Townſhend*, *Warner*, and *Goddington*,) and divers others to the jurors unknown; the ſaid named defendants and the ſaid other perſons then being inhabitants of *Birmingham*, or the neighbourhood thereof; whereby each of the ſaid parties whoſe names were thereunto ſubſcribed mutually covenanted and agreed with the others, their executors, &c. and aſſigns, that the parties thereto ſhould be joint traders and co-partners in the buſineſs of buying corn; grinding the ſame, making bread, and dealing in and diſtributing of flour and bread, in ſuch manner as ſhould be thought moſt advantageous to the co-partnerſhip by the committee for the time being, to be appointed in manner therein mentioned; and that the co-partnerſhip ſhould commence from the 1ſt of *June* then laſt, and be continued until determined in manner thereinafter mentioned, and ſhould be carried on under the name or firm

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of *The Birmingham Flour and Bread Company*; and also that the said joint trade should be carried on upon a capital or joint stock not exceeding 20,000*l.*, to be divided into not more than 20,000 equal shares. And it was by the said deed-poll, amongst other things, agreed that no partner should hold more than 20 shares, unless the same should come to him by marriage, or other means therein mentioned. And that if any transfer, sale, or assignment should thereafter be made by any of the said partners to any person holding or entitled to as many shares as should, with the shares so transferred, sold, or assigned, exceed 20 in number for each member, (except by marriage, bequest, succession, or other act of law,) that such share and shares as should exceed 20 for each person, should sink into the said capital or joint stock for the benefit of the said copartnership. That ground should be bought or rented, and proper mills, store-rooms, bake-houses, and other conveniencies should be erected, and the business carried on where the committee for the time being should appoint. And that each of the parties thereto, his executors, &c, and assigns, in respect of each share, should weekly purchase from the co-partnership, at the prices fixed by the committee, such a quantity of flour and bread, or flour, or bread, not exceeding in value 1*s.* a week for each share as the committee should deem expedient. That in default of the party paying for the same, his share should be forfeited and sold, &c. [The deed then contained a provision for the appointment of a committee of 21 partners for the management of the concern.] That the committee should convene a general meeting of the partners when they should think proper, when a state of the affairs of the said partnership should be laid before them, and the votes of a majority

majority of the partners in value then present should be final and conclusive; the votes to be taken by shares, and not by voices. That the said capital or joint stock should be paid to the bankers for the time being, by such instalments as should be ordered by the committee, so as no call should exceed 10*l*. per cent. on each share, or be made at less than a month from the preceding call; and every person who should neglect or refuse to make good such payments for a month should forfeit his shares, which should sink into the joint stock. That no partner should at any time, sell, assign, or transfer any share or interest in the said joint trade to or in trust for any person, unless the person to or for whom the same should be sold assigned or transferred should enter into such covenant or covenants with the partners for the time being in the said joint trade, or with a trustee by them or their committee to be appointed, for the performance of all and every the covenants, clauses, and things therein contained, by virtue of a power thereinafter contained; in the same manner as such person so selling, assigning, or parting with the same ought to do or have done, and as such person to or for whom the same should be sold, assigned or transferred would or ought to do or have done, in respect of such share or shares, in case he had originally been a partner in the said joint trade, and had been a party to and executed the said deed-poll; as by the said parties for the time being or their committee or counsel should be lawfully and reasonably required. And that in case of death or insolvency of any of the partners for the time being, their legal representatives or assignees should be considered as partners in the said joint trade, and should and might hold and dispose of such share or shares of such persons, so dying or becoming insolvent, subject to the terms in

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the said deed-poll contained. And also that it should be lawful for a majority in value of the partners for the time being present at any public meeting held by notice, &c., from time to time to make such additions to and alterations in all or any of the said articles or deeds of partnership, and all such lawful by-laws respecting the said joint trade, and for the government and advantages thereof, as to them should seem proper and convenient. That it should be lawful for 3-4ths in value of the whole of the partners, at any general meeting pursuant to a month's notice, &c. to dissolve the said joint trade or co-partnership. And, lastly, each of the parties to the deed promised and agreed with the others, and also with the treasurer of the said joint trade for the time being, from time to time to pay to the banker of the said joint trade 1*l.* for each share, when called for by the committee; and also all other sums which he should from time to time become indebted to them for or on account of the said joint trade, &c. That at the time of executing the said deed-poll, the defendants, *Barber*, *Townshend*, *Goddington*, and 1300 other persons executing the same, subscribed divers sums according to the amount of their several shares in the said co-partnership. And that after the same had been so executed, 1200 other persons, amongst whom were the defendants *Webb*, *Parkes*, *Ledsam*, and *Pritchet*, became subscribers to and members of the copartnership, and subscribed divers sums for the purpose of carrying on the same; and that the shares thereof taken by the several subscribers and members thereof amounted, at the time of taking the inquisition, to 8300, many of which shares have been, from time to time, since the establishment of the copartnership, sold and transferred, according to the terms of the deed-poll,

to

to divers persons not originally members of the copartnership, and the transfer of such shares made by the chief clerk to the committee for the time being appointed by virtue of the deed-poll, and under the direction of the committee. That after making the deed-poll, and when a sufficient sum had been subscribed for that purpose, certain freehold premises in the parish of *Aston*, near *Birmingham*, were purchased, and a steam-engine, storehouse, bakehouses, and other buildings erected thereon, under the directions of the committee, according to the provisions of the deed; and that the copartnership trade has, from the time of the erection of the engine and buildings, been carried on under the direction of such committee, of which all the defendants have been for the greatest part of the said time and still are members. The jurors further found that the company was originally instituted from laudable motives, and for the purpose of more regularly supplying the town of *Birmingham* and the neighbourhood with flour and bread, and that the same was in its original institution and still is beneficial to the inhabitants at large of *Birmingham* and its neighbourhood, but *is* prejudicial to the bakers and millers of the said town and neighbourhood, in their respective trades. But whether the copartnership is an unlawful undertaking and public nusance, within the meaning of the stat. 6 *Geo.* 1. (*c.* 18.) and whether the defendants have, in becoming members thereof and subscribing thereto, and acting therein as aforesaid, offended against the statute, the jurors pray the advice of the Court; and find a verdict of guilty on the 2d, 5th, 6th, 7th, and 8th counts, or not guilty thereon accordingly.

This

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This case was argued in last *Easter* term by *Reader* for the prosecution, and *Bramston* for the defendants; the arguments turning upon the application of the stat. 6 G. 1. c. 18. s. 18. & 19. to the facts stated in the special verdict. The cases referred to in the course of the argument were *Dodd*'s case(a), *Buck* v. *Buck* (b), and *Rex* v. *Stratton and Others* (c). And after time taken by the Court for further consideration of the case;

Lord ELLENBOROUGH C. J. now delivered judgment. This was an indictment founded on the stat. 6 *Geo.* 1. c. 18. s. 18, and 19., by which certain mischievous and dangerous undertakings therein specified are declared to be public nusances. [After stating the indictment and the substance of the special verdict, his Lordship continued.]—The special verdict in this case has not found that the acts imputed to the defendants were *in fact* grievous, prejudicial, or inconvenient to any of his majesty's subjects *during the time to which the indictment relates*: on the contrary, it is found, that the undertaking was originally set on foot from laudable motives, and that the same was, in its original institution, and *still is beneficial* to the inhabitants at large of the town of *Birmingham* and its neighbourhood. But it was urged that the facts found to have been done on the part of the defendants are such as *the statute assumes and concludes* to be grievous, prejudicial, and inconvenient to great numbers of his majesty's subjects, and that they must accordingly be deemed so to be *in point of law*, though they are not found to be so *in fact*. The acts supposed to be made out against the defendants are these; 1st, that they have

(a) 9 *East*, 516. (b) 1 *Camp. N. P. Cas.* 547. (c) Cited *ib.* 549.

raised

raised a large capital by small subscriptions; 2dly, that this has been done to enable them to buy and grind corn, to make bread, and to deal in and distribute flour and bread: 3dly, that the shares in this capital are transferable; and 4thly, that the subscribers have presumed to act as if they were a body corporate. The first and second of these points are certainly established: the third is made out to a certain extent; but to a certain extent only: and the fourth is not made out. That the shares are not transferable, unless under the restriction that the vendee shall enter into covenants to demean himself as though he had been an original subscriber, is quite clear; because there is an express clause to this effect in the deed-poll of *September* 1796. The nature of the thing, too, imposes this additional restriction upon the transfer of shares, that the vendee must either be resident at or near *Birmingham*, or must have an agent there; because the possession of each share imposes upon the holder the obligation of taking weekly so much bread and flour, not exceeding one shilling's-worth per share, as the committee should fix. The shares in the stock, therefore, are not *generally* transferable, but are virtually restricted to persons in the neighbourhood only: they are transferable to no one who will not enter into covenants, and take his weekly portions: no one can become a purchaser of more than twenty shares; and for any thing which appears in the deed, it may be essential that, upon each transfer, the consent of the other members or of the committee should be obtained. It is to this extent only, and in this manner, that shares are transferable. As to the fourth point, that the subscribers have presumed to act as if they were a body corporate; how is this made out? It was urged that they assumed a common name, (which, however, does not appear to have been the case;) that

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that they have a committee, general meetings, and power to make by-laws: but are these unequivocal indicia and characteristics of a corporation? How many unincorporated insurance companies and other descriptions of persons are there that use a common name, and have their committees, general meetings, and by-laws? Are these all illegal? or which of these particulars can be stated as being, of itself, the distinctive and peculiar criterion of a corporation? Taking it, then, that these subscribers have not acted peculiarly as a body corporate, but that they have raised a large capital by small subscriptions for the purposes stated, and that the shares in such capital are, to the extent already pointed out, transferable; it remains to be considered how far this is necessarily per se, without any prejudice to any individual, constituted an offence by the stat. 6 *Geo.* 1. *c.* 18. *s.* 18, 19. The title of that act, as far as it has reference to this subject, is for restraining several extravagant and unwarrantable practices therein mentioned. The occasion of passing it is well known. Subscriptions had about that period been opened to an enormous extent, (to as much, it is said, as 300 millions,) upon the wildest schemes imaginable (*a*): the shares in such adventures were transferable: they were as common an article of sale at market as the stock in the public funds, and had been sold at immense premiums. The first clause in the act applicable to this subject begins by reciting "that it was notorious that several undertakings or projects of different kinds had been publicly contrived and practised, or attempted to be practised, which manifestly *tended* to the common grievance, prejudice, and inconvenience of

(*a*) His Lordship referred to *Anderson's History of Commerce*, as to the various adventures of this period.

great

great numbers of his Majesty's subjects in their trade or commerce, and other their affairs; and that the persons who contrived or attempted such dangerous and mischievous undertakings or projects, under false pretences of public good, did presume, according to their own devices and schemes, to open books for public subscriptions, and to draw in many unwary persons to subscribe therein towards raising great sums of money, whereupon the subscribers did pay small proportions; which *dangerous and mischievous* undertakings or projects related to several fisheries and other affairs, wherein the trade, commerce, and welfare of his Majesty's subjects, or great numbers of them, were concerned or interested." This is the substance of the first recital, and it seems to refer to such undertakings and projects as tended to the common grievance, &c. of many of the King's subjects, and to subscriptions upon such undertakings and projects *only*. The next recital is "that in many cases *the said undertakers and subscribers* (that is, as it should seem by the first recital, the undertakers and subscribers upon *projects of such a tendency*,) had presumed to act as if they were corporate bodies, and had pretended to make their shares in stocks transferable, without any legal authority, by act of parliament or charter; and in some cases the undertakers or subscribers had acted or pretended to act under some charter granted for special purposes therein expressed, and had used such charters for raising joint stocks and making transfers for their own private lucre; which were never intended by the charter: and in some cases the undertakers or subscribers had acted under some obsolete charter. That many other unwarrantable practices, stated to be too many to enumerate, had been, were, and might be contrived, &c. to the ruin and destruction

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ſtruction of many of the King's ſubjects, if a timely remedy were not provided; and that it was become abſolutely neceſſary, that all public undertakings and attempts, *tending to the common grievance, prejudice, and inconvenience* of the King's ſubjects in general, or great numbers of them, in their trade, commerce, or other lawful affairs, ſhould be effectually reſtrained and ſuppreſſed by ſuitable and adequate puniſhments. It then, for ſuppreſſing ſuch miſchievous and dangerous undertakings and attempts, and preventing the like in future, proceeds to enact that all and every the undertakings and attempts *deſcribed as aforeſaid*, and all other public undertakings and attempts *tending to the common grievance*, &c. of the King's ſubjects, or great numbers of them, in their trade, commerce, or other lawful affairs, and all public ſubſcriptions, receipts, payments, aſſignments, transfers, &c. and all other matters and things whatſoever for furthering, countenancing, or proceeding in any *ſuch* undertaking or attempt; and more particularly the acting or preſuming to act as a body corporate, the raiſing or pretending to raiſe transferable ſtock, the transfering or pretending to transfer any ſhare in ſuch ſtock, without legal authority by act of parliament or charter, and all acting or pretending to act under any charter granted for ſpecial purpoſes, by perſons uſing ſuch charter for raiſing a capital ſtock or making transfer of ſuch ſtock, where ſuch charter did not deſign the raiſing or transferring ſuch ſtock, and all acting or pretending to act under any obſolete charter, become void or voidable by non-uſer or abuſer, or for want of elections, ſhall be deemed illegal and void." What is, therefore, thus deſcribed as illegal may be divided into two claſſes; firſt, the undertakings deſcribed in the preamble, eſpecially thoſe in which the

parties pretend to act as a body corporate, or to have transferable ſtock; and ſecondly, all other undertakings tending to the common grievance, &c. of the king's ſubjects, or great numbers of them, in their trade, commerce, or other lawful affairs; raiſing transferable ſtock, &c. &c. The 19th ſection provides, that all ſuch unlawful undertakings and attempts *ſo tending to the common grievance*, &c. as before, and the making or taking any ſubſcription for that purpoſe, the receiving or paying any money on ſuch ſubſcriptions, the making or accepting any transfer or pretended transfer of any ſhare or ſhares upon ſuch ſubſcription, and all and every other matter and thing for furthering, countenancing, or proceeding in any ſuch unlawful undertaking or attempt; and more particularly the ſeveral acts more particularly prohibited in the preceding clauſe, of acting as a corporate body, raiſing transferable ſtock, or aſſigning any ſhare therein, without legal authority, and acting under charters, &c. *ſhall be deemed public nuſances*, and ſhall be tried as ſuch; and all offenders therein ſhall be liable to the puniſhment to which perſons convicted of public nuſances are ſubject, and moreover ſhall incur and ſuſtain any further pains, &c. as were ordained by the ſtatute of proviſion and premunire made 16 *Ric.* 2.; that is, forfeiture of all lands, goods, and chattels, and impriſonment for life. By *ſ.* 20. any merchant or trader ſuffering particular damage in his trade, &c. by occaſion or means of any undertaking or attempt, matter or thing, by that act declared unlawful, is entitled to remedy by action: and by *ſ.* 21. any broker bargaining for, buying, ſelling, &c. any ſhare or intereſt in any of the undertakings by that act declared to be unlawful, or in any ſtock or pretended ſtock of ſuch undertakers, ſhall be rendered inca-

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pable of again acting as a broker, and forfeit 500*l*. The act then contains provisoes, that it shall not extend to undertakings settled before the 24th of *June* 1718, nor to the two companies established under that act, viz. the Royal Exchange and *London* Assurance Companies, nor to the *South Sea* Company, nor to the carrying on home or foreign trade in partnership in such manner as had usually been done, and before that act might legally be done, nor to corporations before created for carrying on trade, nor to subscriptions for enlarging the stock of the *South Sea* Company (*a*), nor to the *East India* Company. Upon this view of the statute we think it impossible to say, that it makes a *substantive* offence to raise a large capital by small subscriptions, *without any regard to the nature and quality of the objects for which the capital is raised, or whatever might be the purposes to which it was to be applied.* The recital in the act, as far as it refers to subscriptions, is this, that the persons who contrive such *dangerous and mischievous* undertakings or projects, (*i. e.* such as manifestly tend to the common grievance, &c.) under false pretences of public good, do presume, according to their own devices and schemes, to open books for public subscriptions, and draw in many unwary persons to subscribe, &c. The subscriptions, therefore, which the preamble contemplated, were subscriptions upon *dangerous and mischievous* projects, where the pretences of public good were false, and where the unwary

(*a*) It appears from the 5 vol. of the *Historical Register*, 187. 205 and 289, that the stat. 6 *G.* 1. *c.* 4., concerning this company, passed the 7th of *April* 1720. The statute in question, 6 *G.* 1 *c.* 18. passed the 11th of *June* 1720. Immediately after the prorogation of parliament, on the 11th of *June*, a proclamation issued enforcing the latter act On the 2d of *June* 1720, *S. S.* stock was at 890*l*. per cent. On the 3d of *June* it fell to 640*l*. in consequence of the number of sellers; but it rose the same evening to 750*l*., at which price it continued with very small fluctuation until the closing of the company's books on the 22d of *July* 1720.

were

were the perfons who were drawn in to fubfcribe. The enacting part in *f.* 18., where it refers to fubfcriptions, makes illegal all public fubfcriptions, &c. for furthering, countenancing, or proceeding in any *fuch* undertaking or attempt; that is, fuch undertakings or attempts as are fpecially pointed out in the preamble, or any other public undertaking or attempt tending to the common grievance, &c. The enacting part in *f.* 19. relates to all fuch unlawful undertakings and attempts, *fo tending* to the common grievance, &c. and the making or taking of any fubfcriptions *for that purpofe*, &c. It is only, therefore, where the fubfcription is with reference to undertakings, &c. which the act prohibits, that it is illegal: the act does not apply indifcriminately to all fubfcriptions. The purpofe for which this capital was raifed, viz. the buying corn, &c. not manifeftly tending to the common grievance, and being in this cafe exprefsly *found* to have been *beneficial*; the only remaining queftion is this, whether, as the fhares in this inftitution are, to the extent which has been pointed out, transferrable, the defendants have offended againft this act in refpect of having raifed fuch a defcription of transferrable ftock. It may admit of doubt, whether the mere raifing transferrable ftock is in any cafe, per fe, an offence againft the act, unlefs it has relation to fome undertaking or project which has a tendency to the common grievance, prejudice, or inconvenience of his Majefty's fubjects, or of great numbers of them. The mifchief intended to be remedied arofe from *fuch* undertakings and projects; and the fuppreffion of *fuch* undertakings and projects feems to be the great object of the act. But, without entering particularly into that point, it may be fufficient to fay here, that in the qualified extent to which thefe

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ſhares are transferrable, it cannot be ſaid that there has been *ſuch* a raiſing of transferrable ſtock as to fall clearly within the ſcope of the act. It was not the object of the undertaking to raiſe ſtock *for the purpoſes of transfer*, nor to make ſuch ſtock a ſubject of commercial ſpeculation or adventure: it is made expreſsly transferrable to no one individual to a greater amount than 20*l.*, and the purchaſer is obliged in every caſe to enter into covenants, and to comply with the condition of taking from the inſtitution a weekly ſupply of bread and flour. For theſe reaſons we think that the facts ſtated on this ſpecial verdict do not bring the defendants within the prohibition of this act of parliament, ſo as to make them, according to the fair ſenſe and meaning of it, liable to be found guilty on any of the counts in this indictment; and that the judgment muſt therefore be entered for the defendants.

JANE PERROTT and Others, Executrix and Executors of GEORGE PERROTT, who was surviving Executor of the Rev. ANDREW PERROTT, *against* GEORGE WIGLEY PERROTT.

Wednesday, July 3d.

The defendant's ancestor and devisor gave a bond in a penal sum, conditioned to pay, after *Mary Territt*'s death, 1000*l.* to such person or persons as she should, *by deed or will*, appoint; held, 1st, that such an alternative power to appoint a sum of money, (not necessarily working a transmutation of property like an appointment of land,) was meant to be ambulatory during the life of the person who was to make the appointment; and therefore that an execution of it by deed (which in fact was retained in her own possession) might be revoked by cancellation animo cancellandi, though it contained no power of revocation.

But, 2dly, That as the mere act of cutting off her name and seal from the deed was equivocal, it might be explained, and its effect done away, by shewing, from what was said by her at the time, that she did it under a mistaken notion that she had provided an effectual appointment by her will made after the deed, and that the deed was therefore useless: whereas, in truth, her will could not operate as an appointment; as it contained no direction for raising the money upon the obligor's estate; but proceeded upon the supposition, as therein expressed, that the children of her appointee (who was dead at the time of the will made) "would acquire the said 1000*l.* *under and by virtue of the deed of* "*appointment*," and giving all the rest and residue of her estates and effects to them and others, "on the express condition that they (the children) should bring into hotchpot "with such residue, &c. the said 1000*l.*" And whether she mistook *the contents* of her will at the time she cut off her name and seal, and made the declaration before mentioned; (which would be a mistake *in fact*;) or whether she mistook *the legal operation* of her will; (which would be a mistake *in law*;) in either case the mistake annulled the cancellation.

THIS was an action of debt. The plaintiffs, as the personal representatives of *Andrew Perrott*, Clerk, declared against the defendant as heir and devisee of the Honorable *George Perrott*, deceased, late one of the Barons of the Exchequer, upon a bond, dated the 18th of *April* 1763, made by Mr. Baron *Perrott* to the said *Andrew Perrott*, in the penal sum of 5000*l.*; the condition of which bond was set out upon oyer, and recited that a marriage was agreed to be had between *John Territt*, Clerk, and *Mary Perrott*, sister of the obligor, and that *Mary Perrott* was entitled to a share of the effects of *W. Plaxton*, her late uncle, under his will, part of which she had received from the obligor, his surviving executor, and the residue due to her was calculated to amount to 300*l.*, when the debts owing to Mr. *Plaxton*'s estate

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could be got in, if ever. And reciting that the obligor was indebted to *Mary Perrott* in 500*l.*, and that ſhe, with the conſent of Mr. *Territt*, had, by a deed-poll of the ſame date as the bond, aſſigned to the obligor all her intereſt in the reſidue of her ſhare of Mr. *Plaxton*'s eſtate and effects, and had alſo by the ſame deed-poll releaſed the obligor from all claims and demands upon him, either in his own right or as executor of Mr. *Plaxton*: the condition was, that if the intended marriage took effect, and the obligor, his heirs, &c. paid to Mr. *Territt* and *Mary Perrott*, during their joint lives, 100*l.* a-year, payable half-yearly; and in caſe *John Territt* died before his intended wife, that the obligor, his executors, &c. ſhould pay the ſaid yearly ſum of 100*l.* to *Mary Perrott*, or her aſſigns, during her life; and in caſe ſhe died without iſſue, the obligor ſhould alſo pay, within 12 calendar months after her death, 1000*l.* *to ſuch perſon or perſons as ſhe ſhould, after* John Territt'*s death, by deed or will appoint* (*a*): then the obligation to be void.

The defendant then pleaded, 1ſt, that the ſaid intended marriage between *John Territt* and *Mary* took place, and that *John Territt* firſt died, and afterwards *Mary* died without iſſue; that the annuity had been duly paid according to the condition of the bond; and that *Mary*, after the death of *John Territt*, *did not, by any deed or will, appoint the payment of the* 1000*l.* *to any perſon or perſons whatever.* To this the plaintiff replied that the ſaid *Mary* did, after the death of her huſband, by her deed ſealed and delivered, appoint the ſaid 1000*l.* to be paid

(*a*) Other contingencies were provided for, which, in the event which happened, it is unneceſſary to ſtate.

to

to *John Perrott*, her brother, his executors, &c.: and the defendant rejoined, taking iſſue upon ſuch appointment.

2d plea, That *Mary* did not, *at her deceaſe*, leave any appointment of the 1000*l.* by any deed or will *then in force*, to any perſon or perſons whatever. To this the plaintiff replied that the ſaid *Mary* did, at her deceaſe, leave an appointment of the ſaid 1000*l.* by her deed, then in force, theretofore and after the death of her huſband duly ſealed and delivered, whereby ſhe appointed the ſaid 1000*l.* to be paid to *John Perrott*, her brother, his executors, &c.: and the defendant rejoined that ſhe did not, at her death, leave any ſuch appointment in force; on which iſſue was joined.

3d Plea, (after ſtating the marriage and death of *John Territt* without iſſue,) that *Mary*, after his death, made a certain deed-poll, ſealed with her ſeal, *and which had ſince been cancelled or deſtroyed*; by which, after reciting "that by a bond of her late brother *George Perrott*, dated the 18th of *April* 1763, he became bound to her late huſband *J. Territt* in 5000*l.* conditioned for the payment of the yearly ſum of 100*l.* during the joint lives of her and her huſband, and alſo for the payment, within 12 calendar months after her deceaſe, in caſe ſhe ſhould die without iſſue, to ſuch perſon or perſons as ſhe ſhould, after the death of her huſband, by deed or will appoint, the ſum of 1000*l.*; which bond having been duly proved before the deputy remembrancer of the court of Exchequer, purſuant to a decree of that Court in a cauſe wherein *George Perrott* was plaintiff, and *Andrew Perrott*, Clerk, and others were defendants, the deputy remembrancer, purſuant to an order of that

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Court, dated the 7th of *May* 1784, made his separate report, dated the 16th of *December* 1784, and thereby certified (among other things), that the said bond had been allowed by him, and was the only debt of the testator, *George Perrott*, her said late brother, then remaining due; and also reciting that the due performance of that bond was since sufficiently secured to *Mary Territt*, by an indenture of eleven parts, dated the 18th of *April* 1786, purporting to be a settlement of the freehold and leasehold estates, late of her said brother *George Perrott*, in pursuance of his will and of a decree of the Court of Exchequer; she, *Mary Territt*, *in pursuance and execution of the power* or authority so given to her by the said recited bond of the 18th of *April* 1763, and of all other powers and authorities in anywise enabling her in that behalf, did by the said deed or instrument in writing, signed, sealed, and delivered by her, in the presence of and attested by two credible witnesses, whose names were thereunto subscribed, as attesting the execution thereof, *appoint* the said 1000*l.* to her brother *John Perrott*, his executors, &c.: and further says, that afterwards the said *John Perrott* died; and that *Mary Territt*, after the making of the said deed-poll, and after the death of the said *John Perrott*, duly made her last will in writing, and thereby devised as follows: "Whereas by a deed-poll "or instrument in writing, dated 1st of *February* 1800, I "appointed 1000*l.* after my decease to my brother *John* "*Perrott*, his executors, &c.; and whereas my brother "died in *August* last, leaving a son, the said *Thomas Per-* "*rott*, and a daughter *Mary*, the wife of *James Bousquet*, "him surviving, who, in the event of my said brother "*John Perrott* having died intestate, will be entitled to

"the

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" the whole or some part of the said 1000*l.*; now as to
" all the rest, residue, and remainder of my estate and
" effects whatsoever and wheresoever, after payment of
" my debts, legacies, and funeral expences, and the
" charges of proving this my will, I give the same to
" my nephews *George Perrott*, the said *Thomas Perrott*,
" *William Plaxton Alcock*, and my said niece *Mary Bous-*
" *quet*, equally share and share alike, to hold the same
" to them, their executors, &c. for ever, as tenants in
" common and not as joint tenants: *but on the express*
" *condition, nevertheless, with regard to the said* Thomas
" Perrott *and* Mary Bousquet, *that they do and shall re-*
" *spectively bring into hotchpot, with such residue of my estate*
" *and effects, the whole or so much of the said* 1000l. *as they*
" *shall acquire under or by virtue of the hereinbefore-men-*
" *tioned deed of appointment*, and the death of my brother
" intestate as aforesaid; and do and shall divide the
" same equally with the said *George Perrott* and *William*
" *Plaxton Alcock*. And if they the said *Thomas Perrott*
" and *Mary Bousquet*, or either of them, shall refuse to
" bring the same into hotchpot as aforesaid, then I will
" and direct that the parts or shares, part or share, of
" the residue of my estate and effects by me hereinbe-
" fore given to them, him, or her so refusing, shall go
" to and be equally divided between the said *George Per-*
" *rott* and *William Plaxton Alcock*, share and share alike,
" for their own respective use and benefit for ever;
" any thing thereinbefore contained to the contrary in
" anywise notwithstanding." Which said will after
her death was duly proved. And that the said *Mary*,
having always kept the custody and possession of the said deed-
poll from the making of the same, afterwards, and a short

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time after the making of the faid will, *cancelled, and thereby revoked the faid deed-poll of appointment;* and afterwards died without iffue, and without having made any other appointment of the faid 1000*l.* or any part thereof, by deed or will, and without any republication of her faid laft will; leaving the faid *George Perrott* her furviving. To this the plaintiffs replied, that the faid deed-poll was duly fealed and delivered by the faid *Mary*, and fubfcribed with her name, after the death of her hufband; and that the fuppofed cancellation thereof was the cutting off the name and feal of the faid *Mary* therefrom; and *that the faid name and feal were fo cut off by and through ignorance and miftake, and without any intention on the part of the faid* Mary *to revoke the faid appointment of the faid* 1000l. *made by the faid deed;* and concluded—*without this, that the faid* Mary *revoked the faid appointment of the faid* 1000l. *in manner and form* as by the faid laft plea is fuppofed. The rejoinder took iffue on fuch revocation; on which alfo iffue was joined.

A breach was affigned, under the ftatute, in non-payment of the 1000*l.* within 12 calendar months, after the deceafe of *Mary Territt*; and the venire awarded accordingly.

The caufe was tried before Lord *Ellenborough* C. J. at the fittings after laft *Michaelmas* term, when a verdict was found for the plaintiffs, with 1*s.* damages for the detention, and 1000*l.* damages for the breach affigned; fubject to the opinion of the Court on the following cafe.

Mrs. *Mary Perrott*, (afterwards *Territt*,) the fifter of the obligor, the late Mr. Baron *Perrott*, intermarried

with Mr. *John Territt*, the perſon mentioned in the condition of the bond, and in 1800, after the death of her huſband, by a deed duly ſealed and delivered by her as her act and deed, and ſubſcribed with her name, in the preſence of two witneſſes who atteſted the execution thereof, ſhe appointed the ſaid ſum of 1000*l.*, in the condition of the bond mentioned, after her death to her brother, *John Perrott*, his executors, &c. as ſtated in the 3d plea. This deed was prepared and executed with the knowledge of Mr. *John Perrott*, the appointee, but it was kept by Mrs. *Territt* amongſt her papers, and it did not contain a power of revocation. The ſaid Mr. *John Perrott*, the appointee, died before Mrs. *Territt*, leaving a ſon and daughter, *Thomas Perrott*, and *Mary* the wife of the Rev. *J. Bouſquet*, him ſurviving. After his death, and in the ſame year, ſhe made her will dated the 15th of *September* 1802; which will is ſtated verbatim in the third plea. The deed and will were both made in *London*; and, at the time of making the will, the ſolicitor, who prepared it from Mrs. *Territt*'s inſtructions, converſed with her about the deed which then remained in her poſſeſſion uncancelled, and which deed was never out of her poſſeſſion till after the name and ſeal were cut off, as after mentioned. About a month after the execution of the will, Mrs. *Territt*, being then at a very advanced age, took the deed and will, with ſome other papers, out of the box in the preſence of Mrs. *Powell*, in whoſe houſe ſhe reſided for many years before "her death; and ſaying *that it was a matter that* "*had given her a great deal of trouble*; *that it had been a* "*plaguing thing to her*; *that the purport of it was fully* "*met in her will, and that her will provided for it*;" ſhe ſaid

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said *she might as well destroy it*; and thereupon she cut her name and seal off the deed, and delivered it to Mrs. *Powell* to be used as waste parchment or otherwise as she might think fit. Mrs. *Territt* died in 1805, leaving the several persons named in her will her surviving? After payment of the debts, legacies, and funeral expences of Mrs. *Territt*, the rest, residue, and remainder of her estate and effects amounted to 505*l.* The question was whether the plaintiffs were entitled to recover? If they were, the verdict was to stand: if not, a nonsuit was to be entered.

This case was argued in last *Easter* term by *Abbott* for the representatives of *John Perrott*, the appointee; who contended, first, that the deed of appointment for 1000*l.* once well executed by Mrs. *Territt* in favour of *John Perrott* was not revocable: but if revocable, 2dly, that it was not in fact revoked. The question here, he observed, was properly whether the 1000*l.* should be raised at all, and not how it should be disposed of when raised; (*John Perrott* the appointee having died intestate as to this sum:) if it were not to be raised, the defendant, who is entitled to the estate of Mr. Baron *Perrott*, would have the benefit of it. First, the general rule is that a deed limiting uses cannot be revoked, unless it contain a power of revocation: though it is otherwise in the case of a will, which is ambulatory till the testator's death. *The Earl of Ormond's case* (*a*); *The Earl of Montague* v. *The Earl of Bath* (*b*); *Clavering* v. *Clavering* (*c*); and *Boughton* v. *Boughton* (*d*). This last was the case of a

(*a*) *Hob.* 348. (*b*) 3 *Ch. Cas.* 96. 2 *Ch. Rep.* 417. S. C. (*c*) 2 *Vern.* 473. and 2 *Eq. Cas. Abr.* 52. (*d*) 1 *Atk.* 625.

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voluntary deed of settlement, kept by the settlor in her own possession; yet it was held that it could not be set aside by a subsequent will. [Lord *Ellenborough* C. J. observed that these were all cases of voluntary deeds of settlement of lands afterwards attempted to be revoked by the settlors; but that no case had been cited as to the revocation of a deed executed under a power of appointment, such as this.] To this *Abbott* answered, that it could make no difference in principle, whether the appointment were made out of the party's own estate or out of the estate of another. [Lord *Ellenborough* C. J. There is this difference at least, that where a power of appointment is given to be executed by deed or will, as, if done by will, it would be revocable by a subsequent will, it furnishes some ground for arguing that the person who created the power meant to give the same power of revocation to the person who was to execute it, whether it was first executed by deed or by will; for alterations by death or otherwise amongst the subjects of appointment might equally render it necessary or expedient.] In the one case the instrument by which the power is executed is in its nature revocable; in the other it is not, without a special reservation: and if not revocable, a subsequent cancellation can make no difference, because the interest was vested; as in *Bolton* v. *The Bishop of Carlisle* (*e*). [Lord *Ellenborough* C. J. I do not suppose it will be contended that if an interest were vested by deed, the destroying the evidence of it, by cancelling the deed, would devest the interest.] Then, 2dly, he contended that Mrs. *Territt* did not intend to revoke the appointment she had made by the deed,

(*a*) 2 *H. Blac.* 259. 263. See also on this point *Leech* v. *Leech*, 2 *Chan. Rep.* 100.

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deed, but cancelled it altogether by miſtake; conceiving that ſhe had done the ſame thing by her will which ſhe had before done by the deed. He then reaſoned upon the evidence of her intention ſtated in the caſe; and to ſhew that a cancellation by miſtake either of fact or of law would not hurt, he cited *Burtonſhaw* v. *Gilbert* (*a*), *Onions* v. *Tyrer* (*b*), *Mason* v. *Limbrey*, *before the Delegates* (*c*), *Hyde* v. *Hyde* (*d*), and *Roe* v. *The Archbiſhop of York* (*e*). Here he obſerved that Mrs. *Territt* was certainly under a miſtake in ſuppoſing that her will had ſupplied the place of the deed; for the will did not appoint the 1000*l.* to be raiſed out of Mr. Baron *Perrott*'s eſtate, as againſt the defendant the heir at law who was in poſſeſſion; and therefore if the deed were removed out of the way the 1000*l.* would be loſt for the purpoſe of the appointment; which was clearly again her intention. [Lord *Ellenborough* C. J. By her will Mrs. *Territt* meant to put the children of her former appointee to an election; which ſo far varies from the deed: muſt not the cancellation of the deed therefore be conſidered as a miſtake, if at all, in point of law, and not in point of fact?] She might not have had the exact terms of her will in her contemplation at the time of the imputed cancellation of the deed: ſhe might then have believed that ſhe had in terms provided for the raiſing of the 1000*l.* out of the defendant's eſtate by her will; and then it would be a miſtake in fact: but clearly it was a miſtake of one ſort or another.

Burrough, contrà. The plaintiffs who ſue upon the bond muſt make out the breach of it: and if it be ma-

(*a*) *Cowp.* 49.
(*b*) 1 *P. Wms.* 345. 2 *Vern.* 743., and *Prec. in Chan.* 459.
(*c*) Cited by Lord *Mansfield* in *Goodright* v. *Glazier*, 4 *Burr.* 2515.
(*d*) 1 *Eq. Caſ.* 409. (*e*) 6 *Eaſt*, 86.

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terial for them to ſhew that the cancellation proceeded upon a miſtake of fact, and not of law, the plaintiffs cannot recover without eſtabliſhing that fact. The caſes cited on the firſt point, to ſhew that the deed of appointment once executed could not be revoked, were all caſes of ſettlements of land, and therefore do not apply to this; for there the intereſt being once effectually conveyed to a party muſt remain in him till it is again conveyed away by him; and the mere cancellation of the deed of conveyance cannot deveſt his intereſt. And with reſpect to the Archbiſhop of *York*'s caſe, the conſideration of the ſurrender of the firſt leaſe was the grant of the ſecond; and if the ſecond leaſe granted nothing, the conſideration for the ſurrender of the firſt failed altogether. But, firſt, no intereſt ever paſſed to *John Perrott*, the ſuppoſed appointee; for the inſtrument ſet up was not the *deed* of Mrs. *Territt*, for want of a *delivery* either to the party himſelf, or to ſome perſon for his uſe. It is true that where a deed of appointment, ſuch as this, is made and found *uncancelled* in the poſſeſſion of the party to whom the power was given, at her death, a preſumption ariſes that it had been delivered or was intended as a delivery to or for the uſe of the appointee: but a mere declaration of the party that ſhe had made ſuch a deed, without any evidence or preſumption of a delivery (*a*), is not ſufficient, where the appointment is to be by *deed*, which requires to be perfected by a delivery. *Perkins*, *Faits*, *ſ.* 137. [Lord *Ellenborough* C. J. Here it was conſiſtent with the nature of the inſtrument, that it ſhould remain in her poſſeſſion, as it was not to operate till her death. All that is ſaid in *Perkins* applies to deeds made alio intuitu. But the

(*a*) But ſee the fact of delivery ſtated at the beginning of the caſe; *ante*, 429.

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question here is whether, within the intent of the person creating the power, any thing more was required than the mere form of a deed?] After such an appointment by deed, could the appointee, if he happened to get possession of it, raise money upon it, as upon the sale of an interest vested in him? If so, it would lead to very inconvenient consequences, which in the end might go to defeat the objects of such a power. It is plain that Mrs. *Territt* meant to retain her dominion over the appointment, by keeping the instrument in her own possession. Then, 2dly, at any rate she revoked her first appointment by the cancellation of the deed: for here is not only a cancellation in fact, which the cases cited only shew may be explained and the effect of it done away, by shewing that it was made by mistake and contrary to the intention of the party; but here is positive evidence by the will of a change of her intention, and therefore that her mind went along with the act of cancellation; for by the will she requires that the 1000*l.* should be carried into hotchpot, which essentially varies from the effect of the deed. All the cases of inoperative cancellation are either where the act of cancellation was only partly done, or where it was done under a mistake of fact, as by mistaking one paper for another: but here it is clear that Mrs. *Territt* meant to cancel this instrument, with perfect knowledge of what it was; for she complained that it had given her a great deal of trouble; and it cannot be presumed that she was not cognizant of the contents of her will at the time: and therefore if there was any mistake at all, it could be no other than a mistake in point of law as to the operation of her will: and to hold that a mistake of that sort will render inoperative her act of cancellation of the deed, which she manifestly intended, would be going further than any

case has yet gone, and would lead to dangerous consequences. [Lord *Ellenborough* C. J. We have no difficulty in this case in getting to the conclusion that Mrs. *Territt* was under a mistake in what she did; because we have her declaration at the time accompanying the act of cancellation, "that the purport of the deed was fully met in her will, and that her will provided for it." Whether this was a mistake in law as to the effect of her will, or a mistake in fact as to her having made such a provision in her will, is another question.] It would be a question of fact rather than of law, what the nature of her mistake was: and that would let in a dangerous inquiry in every case of this sort, which would lead to fraud and perjury. It would besides lead to different conclusions in the case of the will of a lawyer, or of any unlearned person.

Abbott, in reply, said that there was no more burthen of proof upon the representatives of the appointee, in trying the validity of the revocation of the deed in an action for the penalty of the bond, than in any other way; as if Mr. Baron *Perrott* had directed the money to be raised by a term subject to Mrs. *Territt*'s appointment. [Lord *Ellenborough* C. J. There is a common distinction to be found in the cases, as to the recovery of money paid under a mistake of law, and under a mistake of fact: and ought not the fact to appear?] In those cases there is no equivocal act intervening like the act of cancellation. But even if the jury in this case had found a special verdict, stating that Mrs. *Territt* had cancelled the deed under a mistake that she had provided for the same purpose by her will, the same question would still have

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come to be decided by the Court as is now presented to them.

Lord ELLENBOROUGH C. J. The Court will look into the cases cited before they give their ultimate opinion upon this case: but upon one point I have no doubt. This was a power to appoint by deed or will; and the power was ambulatory during the life of the person who was to execute it: it was only required to be executed in form by deed or will. I have no difficulty therefore in saying that it might have been executed toties quoties by the one way or the other during Mrs. *Territt*'s life. The only question with us is, whether her having cancelled the deed under a mistake in point of law as to the effect of her will, which she supposed would operate to the same purpose as the deed, would be an effectual cancellation.

GROSE J. concurred in this.

LE BLANC J. Mrs. *Territt* meant that her four devisees should take equally; and she thought that the deed of assignment which she had executed stood in the way of that intention: and upon that idea she acted in her will, by requiring the son and daughter of the appointee, whom she considered as entitled to the 1000*l.* under that deed, to bring the money into hotchpot.

BAYLEY J. Perhaps she was under the mistake, at the time of making her will, of supposing that the deed she had executed was irrevocable.

Cur. adv. vult.

Lord

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Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.

This was an action of debt upon a bond, which was conditioned among other things to pay 1000*l.* to such person or persons as Mrs. *Territt* should by deed or will appoint, provided she survived her husband, and died without issue; both of which events happened. The defendant, after craving oyer of the condition, pleaded three pleas: first, that Mrs. *Territt* made no appointment by deed or will; secondly, that she left no appointment in force at her death; thirdly, that she made a deed, since cancelled or destroyed, whereby she appointed the 1000*l.* to her brother *John Perrott*, his executors, administrators, and assigns. That she afterwards made her will; reciting the said deed; and that *John Perrott* was dead, leaving a son and daughter, who, if *John Perrott* died intestate, would be entitled to a share of the 1000*l.*; and that she thereby devised to *John Perrott*'s son and daughter, and to two other persons, the residue of her estate, upon condition, as to *J. Perrott*'s children, that they should bring into hotchpot so much of the 1000*l.* as they should acquire under the said deed: but if they should refuse such bringing into hotchpot, then what was so bequeathed to them on that condition was to go to the two other legatees. That after the making this will she revoked the deed of appointment, and died without any new appointment, and without any re-publication of her will. To these pleas the plaintiffs replied, first, that Mrs. *Territt* made an appointment by deed to *John Perrott*, his executors, administrators, and assigns: on which issue was joined. Secondly, that she left such an appointment by deed; upon which issue was also joined. And, thirdly, that

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ſhe did not revoke the ſaid appointment: upon which iſſue was alſo joined. On the trial a caſe was made, which ſtates that in 1800, by deed duly executed, ſhe appointed the 1000*l.* to *John Perrott*, his executors, administrators, and aſſigns. That the deed was prepared and executed with *John Perrott*'s knowledge; but that Mrs. *Territt* kept it, and that it contained no power of revocation. That *John Perrott* died, leaving a ſon and daughter; and that after his death Mrs. *Territt* made ſuch will as the third plea ſtates. That at the time of making the will, the ſolicitor who prepared it converſed with Mrs. *Territt* about the deed, which remained in her poſſeſſion uncancelled till about a month after the will was executed. That about a month after the will was executed ſhe took the deed and will out of a box; ſaid it had been a plaguing thing to her; that the purport of it was fully met in her will; that her will provided for it; and that ſhe might as well deſtroy it: and ſhe thereupon cut off her name and ſeal, and delivered the parchment to Mrs. *Powell*, who was by, to do as ſhe pleaſed with it. Upon theſe facts, the queſtion was whether the plaintiffs were entitled to recover: and two points were made on their behalf, upon argument; the one, that Mrs. *Territt* had no power to revoke the deed of appointment; and the other, that what ſhe had done did not amount to a revocation. As to the firſt, the Court expreſſed its opinion at the time, that as it was no part of the original plan, that an appointment once made ſhould be irrevocable; as was obvious from the alternative power of appointing by will, which muſt be revocable, as well as by deed; as the appointment did not neceſſarily work a tranſmutation of property, as an

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appointment of land does. And the point upon which the Court took time to consider was this, whether what had been done by Mrs. *Territt* did amount to a revocation? The argument on the part of the plaintiffs was this; that the cutting off the name and seal was an equivocal act, one that would not destroy the deed, unless done animo cancellandi; that it was done under the mistaken notion that the will was an effectual appointment, and that the deed was therefore useless: that there was no intention to revoke, unless the will would operate as an appointment; and as the will would not so operate, the animus cancellandi or revocandi was altogether wanting. And to this reasoning we are inclined, upon consideration, to accede. That cancellation is an equivocal act, and of no effect unless there be the animus cancellandi, is clear from the cases cited in the argument, of *Burtonshaw* v. *Gilbert*, *Cowp.* 49.; and from *Hyde* v. *Hyde*, 3 *Chanc. Rep.* 155., and 1 *Eq. Abr.* 409.: and it is evident, from the declaration which accompanied the act of cancelling the deed, that it was cancelled upon the supposition that the will would operate as an appointment, and that the money which the deed had directed to be raised would be demandable under the will. Now this was a mistake: the will contains no direction for raising the money, but acts entirely upon the supposition that the deed would continue in force, and that the money would be raised under such deed. This then raises the question, whether such a mistake, clearly evidenced by what passed at the time of cancellation, annuls the cancellation, and entitles us to act as if the animus cancellandi or revocandi were altogether wanting: and we are of opinion that it does. Mrs. *Territt* mistook either the contents of her will, which would be

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a miſtake in fact; or its legal operation, which would be a miſtake in law; and in either caſe we think the miſtake annulled the cancellation. *Onions* v. *Tyrer*, 1 *P. Wms.* 345., and 2 *Vern.* 742., is a ſtrong authority that a miſtake in point of law may deſtroy the effect of a cancellation. And when once it is eſtabliſhed, as it clearly is, that a miſtake in point of fact may alſo deſtroy it, it ſeems difficult upon principle to ſay that a miſtake in point of law, clearly evidenced by what occurs at the time of cancelling, ſhould not have the ſame operation. If a man cancel his will under the miſtake in point of fact, that he has completed another, when he really has not, as was the caſe in *Hyde* v. *Hyde*, the cancellation is void: and if he cancel it under the miſtake in law, that a ſecond will (complete as to the execution) operates upon the property contained in the firſt; when from ſome clerical rule it really does not; ſhall this be deemed a valid cancellation? In this caſe it is clear that Mrs. *Territt* did not abandon her right of having the 1000*l.* raiſed: ſhe thought her will provided for it when it did not. It was upon this ſuppoſition only that ſhe cut off her name and ſeal from the deed: and as this was a miſtaken ſuppoſition, we think we are bound to ſay that the animus cancellandi, that is, of giving up the raiſing of the money at all, was wanting, and conſequently that there muſt be

Judgment for the Plaintiffs.

ROE, Lessee of HAMBROOK, *against* DOE.

Wednesday, July 3d.

Service of a copy of the declaration, &c. in ejectment before the essoign day of the term, on the daughter of the tenant in possession, in the absence of him and his wife, is not sufficient, even though the tenant had since declared that he had received the same, if it do not appear that he had received it before the essoign day.

PEAKE moved yesterday for judgment against the casual ejector, upon a special affidavit, stating the service of a copy of the declaration and notice on the 5th of *June* last, upon the daughter of the tenant in possession, in the tenant's workshop upon the premises, in the absence of him and his wife, and that the person who served it explained to her what it was: and further, that the tenant himself had *since* acknowledged the service of the said declaration and notice, and had declared to the deponent that he had *received* the same. And he referred to *Smith d. Lord Stourton* v. *Hurst*, in 1 *H. Blac.* 644., where a like service on the daughter on the premises, who had delivered it to the wife of the tenant in possession in his absence, was held sufficient, though it did not appear that such *delivery* was *before the essoign* day; and this was so held by C. B., (though at first inclined to refuse the rule,) upon the authority of a prior case of *Goodtitle* v. *Thrustout*, in *Barnes*, 183.

The Court required to see the case in *Barnes*, upon the authority of which alone the Court of C. B. had admitted such a service, before they gave effect to it in this instance; as it did not appear to have come to the tenant's hands *before the essoign day*. The book, however, was not then in court. But on this day *Peake* read the case in *Barnes*, which is stated thus: " *J. C.* tenant in possession, upon a *Sunday* acknowledged the receipt of the decla-

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Doe, Lessee of Hambrook, against Roe.

ration, which before the essoign day had been delivered to his daughter, and she acquainted with the contents. This was held sufficient service," &c. But *this Court* now said, that they could not find any ground stated in that report for departing from the common practice which has prevailed in these cases, and therefore denied the motion.

Wednesday, July 3d.

Taylor *against* Capper.

The Court would not direct a writ of inquiry to be executed after judgment by default in an action of *debt*; but referred it to the Master to ascertain what was due, upon the application of the defendant after execution executed.

RICHARDSON had before moved to set aside an execution which had been levied, without any writ of inquiry executed, in an action of debt wherein the defendant had suffered judgment by default, through a mistake in having pleaded non assumpsit to the action. And now, on moving to make the rule absolute, he was asked by *Le Blanc* J. whether he could refer the Court to any case of a writ of inquiry executed in an action of debt: to which he answered, that he was not aware of any such case: but that, he said, was easily accounted for while the old rule prevailed, that the plaintiff in debt could only recover the exact sum declared for; inasmuch as a writ of inquiry was then nugatory. But since that rule was departed from, first in *Aylett* v. *Lowe* (*a*), and afterwards in other cases, so that it is no longer held necessary that the plaintiff should recover the precise sum laid, the necessity of a writ of inquiry, upon a judgment

(*a*) 2 *Blac.* 1221.; and vide *M'Quillin* v. *Cox*, 1 *H. Blac.* 249. *Emery* v. *Fell*, 2 *Term Rep.* 28. *Bonafous* v. *Walker*, *ib.* 126.; and *Lord* v. *Houstoun*, 11 *East*, 62.

by

by default or upon demurrer, is as evident in this as in other cafes, to inform the confcience of the Court as to the fum juftly due to the plaintiff. 1811. TAYLOR *againft* CAPPER.

The Court, however, would not depart from the ancient practice : but directed that, upon payment of cofts by the defendant, the judgment and execution fhould be fet afide, and that it fhould be referred to the Mafter to afcertain what was due to the plaintiff.

Reader was to have oppofed the rule.

END OF TRINITY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Fifty-second Year of the Reign of GEORGE III.

1811.

WM. BRADFORD *against* ANNA BURLAND, Widow, and EDWD. BRADFORD, Clerk.

Nov.

Where husband and wife, by deed granting an annuity charged on the estate of the wife, demised, for further security, such estate to *E. B.*, a trustee, for a term of 99 years, if the wife should so long live, *upon trust*, to permit the wife to receive and take the rents, &c *until default made in payment of the annuity*; and in case of any such default, *then in trust, in case the annuity should be in arrear for* 20 *days*, being lawfully demanded, that it should be lawful for the trustee, from time to time, out of the rents, &c. or by demise, mortgage, or sale, &c. *to raise and pay the grantee* the arrears and charges, and to permit the wife to take the residue, &c.: It seems that a memorial of such deed inrolled, stating at first that *E. B.* was a trustee nominated and appointed on behalf of the *grantee*; and after stating the grant of the annuity, "*with the usual powers of distress and entry*," (not stating particularly what those powers were as applicable to the trusts of the term) proceeding to state the demise of the term by the husband and wife to the trustee, *in trust* to permit the wife to receive and take the rents, &c. *until default* made in payment of the annuity, &c. and, *in case of any such default*, then *in trust for securing the due payment of the annuity and costs*, &c., is not a valid memorial, inasmuch as it omits to state for whom *E. B.* was a trustee *during the* 20 *days after the annuity should be in arrear*, till the expiration of which time he was not a trustee for securing the due payment of it.

Quære whether a fine, if levied before the memorial is inrolled, is an *assurance*, within the meaning of the annuity act, 17 *G.* 3. *c.* 26. required to be memorialized.

THE Master of the Rolls directed the following case to be stated for the opinion of this Court, as to the sufficiency of the memorial of the grant of an annuity of

400*l.*

1811.

BRADFORD *against* BURLAND.

400*l.* hereinafter mentioned. The annuity was granted and secured by the following instruments and assurances (*a*). By an indenture tripartite, dated 17th of *April* 1800, and made between *William Gordon*, since deceased, and *Anna* his wife (now *Anna Burland* widow, one of the defendants) of the first part; *John Bell* (since dead) of the second part; and the Rev. *Edw. Bradford*, Clerk, the other defendant, therein described as a trustee for *John Bell*, of the third part; after reciting that *John Bell* had agreed with *William* and *Anna Gordon* for the purchase of an annuity of 400*l.* to *J. Bell* during *Anna Gordon*'s life for 2400*l.*, and that *Wm. Gordon* should out of the purchase money pay the expences of the deed, and of a bond and warrant of attorney to confess judgment thereon in *B. R.* for better securing the annuity, and of entering up such judgment, and of a memorial of the annuity to be registered pursuant to the statute, and of registering such memorial; in consideration of the said 2400*l.* by *J. Bell* to *W. Gordon* and his wife in hand paid at or immediately before the sealing and delivery of the deed for the purchase of the annuity, (the receipt of which was acknowledged) *Wm. Gordon* for himself and his wife, and also *Anna Gordon* for herself, granted to *J. Bell* for *Anna Gordon*'s life an annuity of 400*l.* to be paid quarterly at the times and in the manner stated in the deed: and *Wm. Gordon* for himself and his wife covenanted for the payment of the annuity accordingly. And further reciting that one *Stephen Nash*, deceased, being in his lifetime seised in fee of certain lands therein described, in the county of *Dorset*, by his will dated

(*a*) Such parts only of the assurances and the memorial are stated as are sufficient to raise the questions.

1811. BRADFORD *against* BULLAND.

the 17th of *April* 1784, duly executed and attested, devised (inter alia) such lands upon trust for the trustees to receive and apply the rents, issues, and profits thereof, from time to time, for the sole and separate use of his sister the said *Anna Gordon* for her life, without the control of her then or any future husband; remainder to the first and other sons of his said sister, with remainders over. Reciting also that upon the treaty for the purchase of the annuity, it was agreed between the parties, that for the effectually securing the payment of it *J. Bell should have a power to distrain and enter* upon the said lands, &c. in the indenture described, from time to time, when the annuity should be in arrear; and also that the said lands should be demised to *E. Bradford*, in trust for the better securing the payment of the annuity in manner thereinafter mentioned: *Wm. Gordon*, in pursuance of the agreement, and for the considerations therein mentioned, for himself and his wife, further covenanted with *J. Bell*, that *in case any quarterly payment* of the said annuity, or of any part thereof, *should be unpaid for 20 days after either of the said days of payment*, &c. it should be lawful for *J. Bell to enter* upon the lands charged, &c. and distrain for the arrears, and impound the distress until payment of the annuity, and all arrears and all costs thereby occasioned, &c.; and in default of payment of the same in due time after such distress made, to appraise and sell or otherwise dispose of such distress, or otherwise to act therein according to the due course of law, and as is usual in cases of distress for rent reserved on common demises; to the intent that thereby and therewith the said *J. Bell* might be fully paid the said annuity, and all arrears thereof, or so much

 thereof

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BRADFORD *against* FULLAND.

thereof as should be then remaining due and unpaid, and all costs, &c.: and that in case any quarterly payment of the said annuity, or any part thereof, should be in arrear for 30 days next after, &c., then, although no formal or legal demand should have been made thereof, it should be lawful for *J. Bell* to re-enter upon the premises, &c. and take the rents, issues and profits thereof, &c. for his own use, until satisfaction of the annuity and all arrears thereof, and also all charges, &c. And for the considerations before mentioned, and for the better securing the payment of the said annuity to *J. Bell*, *William Gordon* and his wife, by the direction of *J. Bell*, granted and demised to *E. Bradford* the said premises for a term of 99 years, if *Anna Gordon* should so long live, without impeachment of waste, at a pepper-corn rent; *in trust to permit* Anna Gordon *to receive and take the rents issues and profits* of the premises granted, *until default made in payment of the said annuity* at the days in the said indenture mentioned: and *in case* of any *such default, then in trust*, in case *any quarterly payment*, &c. of the annuity should be behind *by the space of* 20 *days next after any of the days of payment* in the said indenture mentioned, being lawfully demanded, that it should be lawful for *Edward Bradford*, from time to time, by and out of the rents issues and profits of the same premises, or by demise, mortgage, or selling the same premises, or any part thereof, for all or any part of the said term of 99 years, determinable as aforesaid, or by bringing actions against the tenants, &c. for recovery of the rents, &c. to raise and pay to *J. Bell* the said annuity, or so much thereof as should be in arrear, and all costs, &c. which *J. Bell* and *E. Bradford*, or either of them, should sustain, &c.,

Demise of a term by the husband and wife to the trustees.

&c., and should apply the same monies accordingly; and should permit *Anna Gordon* to receive and take the residue (if any), &c. for her own use and benefit. And for the better conveying and assuring the premises thereby granted to *Ed. Bradford* for the said term, &c., *William Gordon*, for himself and his wife, covenanted with *Ed. Bradford* that they (the granters) should, as of *Hilary* term, *then last past*, or before the end of *Easter* term *then next ensuing* the date of the indenture, at their costs levy a fine sur concesserunt, with proclamations, of all the said lands, &c., in the indenture described, and thereby intended to be granted and demised, &c. as *E. Bradford's* counsel should advise. Then followed a covenant that the fine should enure to the use of *Ed. Bradford* for the term of 99 years before granted and determinable as aforesaid; but upon the trusts, and to and for the ends intents and purposes before declared concerning the said term. And after further reciting that *W. Gordon* had executed a bond of the same date with the indenture to *J. Bell* in the penal sum of 4800*l.* conditioned for payment of the said annuity of 400*l.* to *J. Bell*, and had also executed a warrant of attorney for confessing judgment thereon, and which judgment was intended to be recorded in *K. B.* as of *Hilary* term then last, &c.; it was by the indenture declared that the said bond and judgment were for securing the same annuity, and were as a collateral security only. The indenture also contained other covenants and clauses of the same import as mentioned in the memorial hereinafter set forth, and was witnessed as stated in such memorial.

1811. BRADFORD against BURLAND.

Covenant to levy a fine.

Bond and warrant of attorney.

1811.
STAFFORD *against* BUTLAND.
Fine levied.

In *Easter* term 40 *G.* 3. a fine sur conceſſerunt, &c. was levied in *C. B.* of the lands demiſed by the indenture and in purſuance thereof, in which *Edward Bradford* was plaintiff, and *W. Gordon* and his wife deforciants. Alſo a bond and warrant of attorney to confeſs judgment thereon in *B. R.*, dated 17th *April* 1800, were executed by *Wm. Gordon* to *John Bell*; the bond in the penal ſum of 4800*l.*, conditioned for payment of the annuity; which warrant of attorney was witneſſed as is ſet forth in the memorial hereinafter ſtated.

Memorial.

The following memorial (*a*) of the ſeveral inſtruments and aſſurances before mentioned was inrolled in Chancery on the 2d of *May* 1800. Memorial of the grant of an annuity to be regiſtered purſuant to the ſtat. 17 *Geo.* 3. *c.* 26. of an indenture of three parts made on the 17th of *April* 1800, between *W. Gordon* and *Anna* his wife of the firſt part, *J. Bell* of the ſecond part, and *Edward Bradford*, clerk, a truſtee nominated and appointed on the behalf of *J. Bell*, of the third part; whereby it was witneſſed, that in conſideration of 2400*l.* by *J. Bell* to *W. Gordon* and *Anna* his wife in hand paid at or immediately before the ſealing and delivery thereof, *W. Gordon* for himſelf and his wife, and alſo *Anna Gordon* for herſelf granted, &c. to *J. Bell* during the life of *Anna Gordon* an annuity of 400*l.*, payable quarterly at the times, place, manner, and form therein mentioned; "*with the uſual powers of diſtreſs and entry* into, over, and upon certain hereditaments in the ſaid county of *Dorſet* therein particularly deſcribed, for the better ſecuring the due and punctual payment of the ſame annui-

(*a*) The parts not material to the argument are abbreviated.

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ty:" and by which said indenture it was further witnessed, that *W. Gordon* and his wife, by the direction of *J. Bell*, granted and demised to *E. Bradford* the said hereditaments therein described, &c. to hold to *E. Bradford* for a term of 99 years, in case *Anna Gordon* should so long live, without impeachment of waste, at a pepper-corn rent, payable as therein mentioned; "*in trust to permit* Anna Gordon *to receive and take the rents* issues and profits of the said estate and premises *until default should be made* in payment of the annuity, &c. at the days and times therein before appointed for the payment thereof: and *in case of any such default, then in trust* for securing the due payment of the said annuity, and of all costs, &c. and expences to be incurred by the non-payment thereof by and out of the rents, issues, and profits of the premises comprised in the said term, or by demise, mortgage, or selling the same, or by such other ways or means as are therein mentioned; and also to permit *Anna Gordon*, from and after such payments as are therein mentioned, to receive and take the residue of the monies (if any) to arise and be received by all or any of the ways and means therein mentioned." And *W. Gordon* and his wife thereby covenanted with *E. Bradford*, that they, *Gordon* and wife, would at their proper costs, &c. levy as of *Hilary* term *then and now last past*, or before the end of *Easter* term *then and now next ensuing*, unto *E. Bradford* a fine sur concesserunt, &c., with proclamations, &c. of the lands, &c. therein and hereinbefore mentioned: which fine it was thereby declared should enure to the use of *E. Bradford* for the said term of 99 years determinable as aforesaid, upon the trusts and for the intents and purposes therein and herein before mentioned; and in which said indenture are contained the usual covenants from the said

1811.

BRADFORD against BERLAND.

W. Gordon, for himself, his heirs, executors, &c. and for the said *Anna* his wife, for the payment of the said annuity, for title, quiet enjoyment, freedom from incumbrances, and further assurances; and that the estate and premises therein mentioned should continue *liable to the powers of distress and entry thereby granted*; and that they had power to grant the said annuity, and to demise and charge the said estate and premises. [The memorial set forth other covenants not material for this purpose.] And also of indentures of a fine sur concesserunt, &c. levied as of *Hilary term now last past, pursuant to the covenant in the said indenture*, wherein *Edw. Bradford* was plaintiff, and *W. Gordon* and his wife were deforciants. And also of a bond of *W. Gordon*, of the same date with the abovementioned indenture, whereby he became bound to *J. Bell* in 4800*l.* with a condition, &c. (as before stated.) And also of a deed-poll or *warrant of attorney* of the said *W. Gordon*, of the same date, whereby he authorized certain attornies of K.B. to confess judgment in the said Court against him in an action of debt on the abovementioned bond; and which abovementioned indenture was executed by the said *W. Gordon* and *Anna* his wife in the presence of *T. O.* and *J. K.* &c.; and which bond and warrant of attorney were respectively executed by the said *W. Gordon* in the presence of the said *T. O.* and *J. K.*, who were the subscribing witnesses to each and every of the said deeds; and which 2400*l.*, being the consideration money for the purchase of the annuity was duly paid by *J. Bell* to *W. Gordon* and his wife in the presence of, &c. The names of all the witnesses to the deeds, and the consideration of granting the annuity, and the mode of the payment thereof, were truly set forth in

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the memorial; and the question was, whether it was a valid memorial of the grant of the annuity, within the act of the 17 *Geo.* 3. *c.* 26. 1812. BRADFORD against BURLAND.

This case was argued in last *Hilary* term upon the following objections, which had been taken to the memorial. 1st, That it does not state that the estate, on which the annuity is charged, was the estate of *Anna Gordon* (now *Burland*), or that she was interested in it, or what was the nature of her interest in the same. 2dly, That it only states that the annuity was secured by the *usual powers of distress and entry*, without stating what such powers were, or the particulars, terms, or extent of them. 3dly, That it does not state for whom *Edward Bradford* was a trustee. 4thly, That it does not specify the estate or premises of which the fine was levied, or to whom the same belonged. 5thly, That it does not express the trusts of the judgment to be confessed on the bond mentioned in the warrant of attorney, or the purposes for which the same was to be confessed. 6thly, That it does not state the fine truly; the fine being in fact of *Easter*, and the memorial stating it to be of *Hilary* term 1800.

Abbott, for the plaintiff, was first desired by the Court to apply his attention to the 6th objection, in respect to the fine not being truly stated in the memorial. As to which he observed, that the deed granting the annuity contains a covenant, that a fine shall be levied either of the preceding *Hilary* or of the ensuing *Easter* term; and the memorial truly sets forth that covenant: but though the fine be mis-stated to be of *Hilary*, when in fact it *6th Objection.*

was

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Bradford against Burland.

was a fine of *Easter* term 1800, yet that error will not hurt; first, because it was not necessary to memorialize the fine at all, and therefore it may be rejected as surplusage: and next, if it were necessary to memorialize an existing fine, the grantor has not shewn that this fine did exist at the time of the memorial inrolled. A fine for assuring an annuity need not be inrolled; for though the first section of the annuity act (*a*), requiring the inrolment of every *assurance* for securing an annuity, would, if taken in its most general sense, extend to a fine; yet other provisions shew that a fine could not have been intended to be included; for the same section requires "the deed, bond, instruments, or other assurance," to be inrolled within 20 days of its execution, and the memorial to state the date, witnesses, &c.; none of which can apply to a fine, which is a suit in court, and not an instrument executed by the parties, and attested by witnesses. The word *assurance*, therefore, in the act, must be confined to assurance by some instrument executed by parties; and so it was considered by the Court in *Sherson* v. *Oxlade* (*b*), where a *judgment* entered up upon a bond and warrant of attorney before the inrolment of the memorial was held not necessary to be inserted in it. Besides, the memorial was inrolled on the 1st of *May*, and *Easter* term did not begin till the 30th of *April* in that year; though it does not appear in what part of the term the fine was levied: it certainly was not actually levied when the deed was executed, on the 17th of *April* 1800; for the covenant is, that it *shall be* levied; which shews that a fine of the preceding *Hilary* term could be

(*a*) 17 *Geo.* 3. *c.* 26.

(*b*) 4 *Term Rep.* 824. See also on this subject *Davidson* v. *Foley*, 3 *Bro. Ch. Cas.* 598.

no part of the assurance in the contemplation of the parties. And the purchaser paid his money upon the execution of the deed, before the fine was levied; which, therefore, was no part of the assurance on which the money was paid; but it rested altogether in covenant. As soon as the deed, bond, and warrant of attorney were executed, and the purchase-money paid, the 20 days within which the instruments must be memorialized began to run, and the annuitant might then have immediately inrolled the memorial before the existence of the fine; and nothing need be memorialized which has no existence at the time. There is no distinction in principle between the case of a fine and a judgment on a warrant of attorney: the advantage of notoriety is as much attained in both cases as if they were memorialized; with this difference, in furtherance of the argument in the case of a fine, that the levying of it is the future act of the grantor; the security for enforcing it in this instance of a married woman resting merely on the covenant of the husband; whereas the entering up judgment upon a warrant of attorney is the act of the grantee, which he may do at his pleasure, and it is his own default if it be not done in time to insert it in the memorial. [Ld. *Ellenborough* C. J. The argument may be material to shew that the fine in this case need not have been memorialized, but when the party has taken upon himself to inrol it as an existing fine, can he inrol it of a wrong term when no such fine existed?] The party making the inrolment has blundered, not only by putting irrelevant matter into his memorial, but by stating that irrelevant matter erroneously: but still if he have truly inrolled all the instruments which he was bound to memorialize, the inserting of other matter, which it appears that he was

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BRADFORD against BOSLANK.

was not bound to inroll, will not hurt. [*Bayley* J. The argument does not go to the point whether a fine, stated to be levied before the annuity is inrolled, must not be truly stated in the memorial: here the party has memorialized a fine as existing before the grant of the annuity, when in fact there is no such fine.] Whether the fine was in existence before or not, it need not be inrolled, as not being an assurance within the view of the annuity act: but it is also material here that it was not in existence at the time of the deed executed, and that the covenant to levy it was future: at most, therefore, it is only a mistake in stating an immaterial fact. [*Le Blanc* J. If it did exist at the time of inrolling the memorial, it was certainly a material security, and the memorial states it as existing.] The argument would then stand on the ground of *Sherson* v. *Oxlade* (*a*), where the Court only intimated a doubt whether, if the judgment actually entered up had been the *only* security, it would not *perhaps* have come within the provisions of the act." He then reverted to the first objection, that the memorial did not state that the estate charged was the estate of *Anna Gordon*, or that she had any and what interest in it: to which he answered that the annuity act does not require it; and so it was decided by this Court in *O'Callaghan* v. *Ingilby* (*b*). The same answer, he said, applied to the second objection, that it only states that the annuity was secured by the *usual powers* of distress and entry, without shewing what they were. This objection was brought forward on the authority of *Desenfans* v. *O'Bryen* (*c*); but that is distinguishable from the present; for there the clauses of the deed omitted in the memorial contained *the trusts of*

1st Objection.

2d Objection.

(*a*) 4 *Term Rep.* 824. (*b*) 9 *East*, 135. (*c*) *Ib.* 559

the

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BRADFORD *against* BURLAND.

the term, some of which were for the benefit of the grantor, that the trustee should permit him to take the rents and profits to his own use till default made in payment of the annuity; and in case only of the annuity being in arrear for 60 days after demand, could the trustee enter and raise sufficient to satisfy the arrears and costs, paying to or permitting the grantor to take the overplus. And the same objection, when arising merely upon a *covenant*, and not upon a *trust*, was over-ruled in *O'Callaghan* v. *Ingilby*. As to the third objection, that it does not fully state for whom *Edward Bradford* was a trustee; the memorial, after stating at the beginning that he was "a trustee nominated and appointed on the behalf of *J. Bell*," goes further and shews that he is a trustee for other purposes, namely, to permit *Anna Gordon* to receive the rents until default in payment of the annuity, and after such default, and satisfaction taken for the arrears, &c. to pay over the residue to her. This is a substantial compliance with the act; the only variation between the deed and the memorial being, that by the deed the trustee has no power to enter till default *for 20 days*, which is not noticed in the memorial. [*Bayley* J. By the deed *E. Bradford* is a trustee for *Anna Gordon* till default made, and for 20 days afterwards; which trust is wholly omitted in the memorial.] He must be considered as a trustee for *Bell* upon the default made, though he may not enter upon the grantors till after the 20 days: and therefore as the memorial states the trust for *A. G.* till default made, the whole appears to be sufficiently stated. The fourth objection is already answered; for if it were not necessary to state the fine at all, it cannot be necessary to specify the estate of which it was levied, or to whom it belonged. The 5th objection is answered by reading the memorial.

3d Objection.

4th Objection.

5th Objection.

Dampier,

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Dampier, contrà, contended first upon general grounds against the construction attempted to be put upon the annuity act, that a literal compliance with the requisites of the first section would suffice, omitting to state the whole substance of the transaction, which it was the principal object of the act to develope. The act meant to give the grantor full information, by the memorial, of all his rights and obligations arising out of the securities, without the necessity of applying to the grantee for an inspection of them. It is necessary to state, therefore, the property charged, to what extent, in respect of what interest, and the true consideration for making the charge. In the *Duke of Bolton* v. *Williams* (*a*), Lord *Loughborough* C. said that the whole res gesta is to be set forth; and this was confirmed by Lord *Kenyon* in *Cummins* v. *Isaac* (*b*). To apply this to the objections taken to this memorial. The sixth is that the fine is not truly stated. The annuity is charged upon an equitable estate of a feme covert, which was to be bound by a fine, the only assurance which could bind it, and therefore the principal security. The term granted to *E. Bradford* by the deed out of the wife's estate was determinable by the coverture, and nothing bound her, after her husband's death, but the fine; yet this, the material and principal security, is mis-stated to be of *Hilary*, when in fact it was a fine of *Easter* term. It is true that the covenant in the deed memorialized is future, and was executed after *Hilary* term, but that does not render the allegation in the memorial less false; and the person seeking information from it is still left uncertain whether it was

6th Objection.

(*a*) 4 *Bro. Chan. Rep.* 297—309. (*b*) 8 *Term Rep.* 184.

levied

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BRADFORD against BURLAND.

levied at all, or when it was levied. It cannot be the true construction of the word *assurance* in the annuity act, that it only includes such instruments executed by the parties as have the requisites mentioned of dates, witnesses, &c. It is not of the essence even of a deed or bond to have witnesses; and if the securities consisted of bills of exchange or promissory notes, which have no witnesses attesting their execution, such securities would be excluded from the operation of the act. But if the security must be such as may have witnesses, in a case which falls so clearly within the view of the act, it may be said that the witnesses to a fine are the Chief Justice and his companions. If the argument, or the Defendant's right to urge it, were at all varied by the non-existence of the fine at the time of the inrolment, the fine being of *Easter* term generally must refer to the first day of the term, which was prior to the inrolment. The case of *Sherson* v. *Oxlade* does not press on this, because the judgment there entered up under the warrant of attorney only confirmed the security of the bond, which was in itself a perfect security on the estate; the judgment only altered the name and degree of the debt. The first and fourth objections fall partly under the same considerations, as they form material parts of the res gestæ. A person looking at this memorial for information would find that the husband and wife had conveyed real property to secure the annuity; but whether it was the husband's or the wife's property would not appear; (for her joining in the fine might be to bar dower;) nor could he collect what estate or interest they had in it, or where it was situated. The first section of the annuity act begins by requiring, in express terms, a memorial of

1st and 4th Objections.

every

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BRADFORD against BULLAND.

every deed, &c. or other assurance; that alone requires the substantial part of every such assurance to be stated, which would necessarily disclose the nature and interest of the parties in any estate conveyed, and its locality. Then the clause proceeding to require further, that every *such* memorial shall contain the date, names of *all* the parties, and for whom any of them are trustees, and of all the witnesses, &c. does not thereby exclude the necessity of stating other matters equally or more important. [Lord *Ellenborough* C. J. "*Such* memorial" may be considered with reference to the various assurances before mentioned, reddendo singula singulis: and the question is, whether the legislature were not satisfied with the jejune dry description of the securities mentioned in the statute, or whether they required a substantial communication of their contents.] The Courts still hold that if the deed granting the annuity contain a clause of redemption, that must be stated in the memorial; and yet that is not required by the letter of the act: but it rests on the general words and the sense of the thing; considering that a redeemable and an irredeemable grant are different things, and that a memorial of the one is not a true description of the other. In *O'Callaghan* v. *Ingilby* it certainly appeared by the memorial that the property charged belonged to the grantor. The second objection is that the memorial states the annuity to be secured by the *usual powers* of distress and entry: but, upon inquiry, it does not appear that there is any *usual* form of such powers, but they vary according to the practice of different conveyancers: those stated in *O'Callaghan* v. *Ingilby* are different from those in *Desenfans* v. *O'Bryen*. In the latter case the trustee might enter, &c. in case

2d Objection.

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the annuity was in arrear for 60 days; but if that were *usual*, as it is there called, it cannot be usual for the trustee to distrain if the annuity should be in arrear for 20 days only, or enter and take the rents and profits if it were in arrear for 30 days, which is so much harder upon the grantor. In ordinary leases, sometimes 14, sometimes 20, sometimes a month or 30 days are given for the re-entry of the lessor in case the rent should be for so long in arrear. Connected with this is the third objection, that it is not truly stated for whom *Edward Bradford* was a trustee; for until default made in the payment of the annuity, *and for* 20 *days afterwards*, he was trustee for *A. Gordon*; for until that time was elapsed, it was not lawful for the trustee to enter and distrain for the arrears on behalf of *Bell*: whereas in the memorial *E. Bradford* is only described as trustee to permit *A. Gordon* to take the rents *till default made* at the days and times appointed for the payment of the annuity, and in case of any *such default*, *then* in trust for securing the payment of the annuity: which is a different trust from that created by the deed, and not so beneficial to the grantor. There is a gap therefore in the statement of the trusts in the memorial during those 20 days. The case of *Desenfans* v. *O'Bryen* (*a*), which bears strongly upon this and the second objection, has not been materially distinguished from the present case; and this objection is founded upon the express words of the act. [*The Court* appeared at the time to be most strongly impressed with this objection, and the relevancy of the case last mentioned to it.] The fifth objection was but slightly noticed. It was said that it ought not

3d Objection.

5th Objection.

(*a*) 3 *East*, 559.

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to be left to inference to collect that the trust of the judgment was to secure the same annuity mentioned in the condition of the bond; but that it ought to have been so expressed. But Lord *Ellenborough* C. J. asked, what other trust of the judgment there could be than was disclosed in respect to the bond and deed: the judgment merely converted the bond debt into a judgment debt: and this objection was no further urged.

Abbott, in reply, insisted upon the construction of the annuity act which he had before contended for, that nothing more was necessary to be stated in the memorial than the circumstances specifically required by the first clause, in opposition to the Defendant's counsel, who had argued that those specific requisitions were only to be taken cumulativè; which he said was contrary to all the cases. [*Bayley* J. If the grantor of an annuity give a bond to secure it, binding himself and *his heirs;* that must be so stated (*a*). *Le Blanc* J. It has also been held not sufficient to state that the obligors were *severally* bound, if they were bound *jointly* as well as *severally* (*b*).] The *heir* is not bound unless named; and if named, he is thereby virtually made a *party*, and therefore would come within one of the descriptions expressly required by the statute; and this may be deemed to extend to the description of the party bound, whether jointly or severally. So the reason why a clause of redemption must be stated is because it is part of the *consideration* of the grant of the annuity, and without it, the duration of the annuity during the life of the person for whose life it is granted

(*a*) Vide *Denne* v. *Dupuis*, 11 *East*, 134. and *Horwood* v. *Underhill*, 10 *East*, 123.

(*b*) Vide *Willey* v. *Cawthorne*, 1 *East*, 398 and *Horwood* v. *Underhill*.

cannot

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cannot be truly ſtated: for ſtating an annuity to be payable for the life of *A.* generally would not be a true deſcription of the fact, if it were to enure only until it was redeemed during his life. [Lord *Ellenborough* C. J. The duration of the annuity would not be truly ſtated in that caſe.] The meaning of the act was that a memorial of every deed, &c. ſhould be inrolled, containing ſuch and ſuch particulars ſpecified; and the dicta' thrown out in ſome caſes, that the res geſtæ muſt appear, apply only to caſes touching the mode in which, and the perſons through whom, the conſideration money was paid. Then as to the fine; it may be true that, when levied, it would be the beſt aſſurance of the annuity; but it is clear that the grantee relied upon the deed, bond, and judgment, and on the *covenant* to levy the fine, as the fine was not levied when he paid his money. And it does not follow that the Court muſt preſume that the fine was levied as of the firſt day of *Eaſter* term; for the party raiſing the objection, if he meant to rely upon it as an exiſting fine at the time of the memorial inrolled, ought to have ſhewn the fact with certainty. But the 3d ſection of the act is moſt deciſive that a fine is not an *aſſurance* within the meaning of it; for it requires "that in every deed, inſtrument, or other aſſurance whereby any annuity ſhall be granted, *the conſideration* really and bonâ fide, (which ſhall be in money only,) and alſo the *names of the perſons* by whom and on whoſe behalf the ſaid conſideration ſhall be advanced, ſhall be ſet forth," &c. which cannot apply to a fine or to a judgment: which is an anſwer alſo to the fifth objection. As to the firſt and fourth objections; it does appear that this was the eſtate of the wife, for ſhe joined in the *demiſe* to *E. Bradford*; and the wife is never

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made a conveying party, unless it is her estate which is conveyed. As to the second objection, he rested upon his former answer, that the act does not require the clause of distress and entry to be stated at all. Then as to the third and principal objection, he said that the memorial stated *E. Bradford* to be a trustee for *A. Gordon till default* made in payment of the annuity: and as to the 20 days intervening before the trustee could enter and distrain for the arrears; he still contended, that immediately upon such default, the trust of the term enured to the benefit of *J. Bell*, the grantee, though the trustee was restrained from entering for the purpose of making the distress till the end of that period.

Lord ELLENBOROUGH C. J. said, that if the Court entertained a doubt in the result upon the validity of one or other of the objections taken, they would have the case argued again. But afterwards the following certificate was sent to His Honor.

This case has been argued before us by counsel: we have considered it, and are of opinion that the memorial above set forth is not a good and valid memorial of the grant of the said annuity.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.
J. BAYLEY.

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MARTIN and Another *against* CROKATT.

Wednesday, Nov. 6th.

A ship being obliged to put into a place of safety in the course of her voyage, in consequence of damage incurred by a sea-peril; if the owner do not abandon, but merely apply to the underwriters for directions how to proceed upon an estimate of the expences of repair, who decline interfering, he cannot afterwards convert it into a total loss, on account of the expences of the salvage being found in the result to have exceeded the value of the ship, which was ultimately sold in the place into which she had been driven by distress; though the sale was directed by the assured to be made on account of all concerned.

THIS was an action by the assured to recover a total loss upon a policy of insurance on the ship *St. Nichdlai* and goods, bound from *Carlscrona* in *Sweden* to *Deptford* or *London*, *warranted free of particular average, unless the ship should be stranded.* The ship in the course of her voyage was run foul of by another vessel in a gale of wind, and from that and other sea perils received so much damage as to be obliged to put into *Warberg* Roads, a small fishing place on the coast of *Sweden*, where she was surveyed, and reported to be incapable of proceeding on her voyage without a thorough and very expensive repair. The assured, *without giving notice of abandonment*, on receiving the intelligence, laid it before the underwriters, and required their directions how to proceed; but they refused to interfere, and denied the right of the assured to abandon, though without assigning any reason for it. Upon which the assured directed a sale of the ship and cargo (which latter was undamaged) for the benefit of all concerned; but the proceeds of the sale, after deducting the expences of it, and of the salvage, left a balance against the assured of above 20*l*. Whereupon it was contended on behalf of the assured, at the trial at *Guildhall*, that inasmuch as the original damage, which in the event had turned out to be a total loss in the value of the ship and cargo, was occasioned by a peril insured against, and that the voyage was thereby lost, they had a right to treat it as a total loss, with benefit of salvage to the underwriters. But Lord *Ellenborough* C. J. being of opinion that, for want of an aban-

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MARTIN *against* CRUKATT.

donment, the aſſured were not entitled to treat this as a total loſs, where the ſhip continued to ſubſiſt in ſpecie in the place whither ſhe was carried, directed a nonſuit.

The Attorney-General now moved for a new trial, and ſaid that there was no clear and preciſe line of diſtinction laid down for aſcertaining what ſhould be deemed a total loſs with benefit of ſalvage, and what an average loſs only, and that it was very difficult to find any principle regulating the caſes of abandonment. All the expences of the ſalvage were incurred in an attempt (though it turned out to be an ineffectual one) to preſerve the ſhip, till it was found that the expences of repair in the place where ſhe was would more than abſorb the whole value; and the damage was occaſioned by a peril inſured againſt, by which the further proſecution of the voyage was found to be impracticable, except at an expence of repair which would have exceeded the value of the thing inſured. To all ſubſtantial purpoſes therefore the owners have in the event incurred a total loſs, at leaſt with reſpect to the ſhip, by a peril inſured againſt, by which the voyage has been loſt; againſt which they are entitled to be indemnified, allowing the underwriters the benefit of the ſalvage received by the ſale of the veſſel.

Lord ELLENBOROUGH C. J. Where the thing inſured ſubſiſts in ſpecie, as it did here, I cannot ſay but that an abandonment is neceſſary if it be neceſſary in any caſe: and if, upon the happening of ſuch a peril, which ſuſpends the voyage, and induces the neceſſity of repair, the owners chooſe to make it a total loſs, upon the loſs

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of the voyage, or the probable estimate of the expences of repair absorbing the value of the thing insured, they ought to give notice of abandonment, to enable the underwriters to elect whether or not they will incur such expences.

GROSE J. concurred.

BAYLEY J. (*a*) The ship remained all the time in the character of a ship, when the owners proceeded to the sale of her, without giving notice of abandonment; and if this could now be converted into a total loss on account of the expences of the salvage having absorbed the value of the ship when sold, the question whether a total or an average loss would be made to depend upon the event of the auction or market at which the ship was sold, against which the underwriters do not insure.

Rule refused.

(*a*) *Le Blanc* J. was absent from indisposition.

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Thursday, Nov. 7th.

SLACKFORD and Another, Executrix and Executor of SLACKFORD, *against* AUSTEN, Sheriff of SURREY.

If upon the execution of a writ of capias ad satisfaciendum, which requires the sheriff to take and *keep the body*, so that he may have it on the return-day of the writ at *Westminster to satisfy the plaintiffs* of their damages, costs, and charges, the sheriff, before the return-day, receive the money due from his prisoner, and thereupon liberate him, before he has paid it over in satisfaction to the party entitled to it, he is answerable as for an escape; and his return under the common rule, of cepi corpus, and that he detained the prisoner until he satisfied him (the sheriff) the levy-money indorsed on the writ, which he had ready, as commanded, &c. is of no avail.

THIS was an action against the sheriff for the escape of one *Bromley*, against whom the declaration stated that the plaintiffs had recovered judgment in *Mich.* term, 50 G. 3. for 280*l.*; which judgment was affirmed on error in the Exchequer Chamber in *Trinity*, 50 G. 3., with 25*l.* further costs, &c.; and that on the 23d of *November*, 51 G. 3., they sued out against *Bromley* an alias non omittas writ of capias ad satisfaciendum upon the said judgments, directed to the sheriff, by which he was commanded to take *Bromley* and him safely keep, so that he might have his body, &c. at *Westminster*, on *Wednesday* next, after 8 days of *St. Hilary, to satisfy the plaintiffs* of their damages, costs, and charges aforesaid, &c.: That that writ was delivered to the defendant, the sheriff, &c. on the 23d of *November* 1810, to be executed in due form of law; by virtue of which the sheriff, on the 8th of *December* following, arrested *Bromley*, and detained him in custody in execution for the damages, &c. aforesaid: and then it alleged a voluntary escape by *Bromley*, by permission of the sheriff, on the 24th of *December; the damages, costs, and charges aforesaid, and every part thereof, being wholly then and yet unpaid*, &c. The defendant pleaded the general issue; and at the trial before Lord *Ellenborough* C. J. at *Westminster*, the writ was proved, as stated in the declaration, indorsed to levy 305*l.* That *Bromley* was arrested under it on the 10th of *December*, and shortly after, not later than the

21st

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SLACKFORD *against* AUSTEN.

21ſt of the ſame month, was ſeen at large again. Thereupon this action was commenced on the 21ſt of *January* 1811; and on the 23d, being the firſt day of *Hilary* term, the ſheriff was ruled to return the alias non omittas writ of capias ad ſatisfaciendum on which *Bromley* had been arreſted; whereupon he returned cepi corpus, and that he detained *Bromley* in cuſtody upon the ſaid writ until he ſatisfied *him (the ſheriff)* the ſum of 305*l.* thereon indorſed; which money he (the ſheriff) had ready, as within he was commanded. The ſheriff's return was in fact filed on the 29th of *January*, though appearing as of the firſt day of term. The plaintiff's attorney proved that he never received the money from the ſheriff for his clients, or gave any authority for the priſoner's diſcharge. Lord *Ellenborough* C. J. however, conſidering at the time, that the ſubſtantial purpoſes of the writ had been ſatisfied by the ſheriff's receipt of the execution money from his priſoner for the uſe of the plaintiffs, and conſidering him as their agent for the purpoſe of paying over the money to them, thought that this action for an eſcape, which imputed an act of tort to the ſheriff in not detaining the body of the priſoner after ſuch payment received by him, was not maintainable, and therefore nonſuited the plaintiff. But his Lordſhip now, after reporting the facts proved at the trial, in conſequence of a rule niſi which had been obtained by *Scarlett*, upon a review of the authorities for ſetting aſide the nonſuit, obſerved that there was more weight in the argument urged on the part of the plaintiffs than on the firſt view of the ſubject he had ſuppoſed; that payment to the *ſheriff* was not a compliance with the exigency of the writ, but only payment to the party himſelf to whom the money was to be paid; and that the

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the sheriff, unless he could be made the agent of the plaintiffs, was not authorized to discharge the prisoner till he had paid over the money to them: and he mentioned *Langton* v. *Wallis*(a), which had been referred to amongst other cases on moving for the rule, where the discharge of a prisoner, upon security taken by the under-sheriff for the payment of the debt, which was afterwards regularly received by him, but not paid over to the plaintiff in the action, was said to be the ground of an action for an escape, but not of debt. There, however, the prisoner was discharged before the money was actually received by the under-sheriff.

Garrow and *Lawes* shewed cause against the rule, and after observing that the action was brought merely for the costs, as the plaintiffs might at any time, after the payment by *Bromley*, have received the money from the sheriff by application for the purpose, they contended that the sheriff was bound to discharge his prisoner after receiving payment of the debt and costs; and if so, it could be no escape; and that all the cases which had been cited in support of the rule were distinguishable from this. *Langton* v. *Wallis* had been already distinguished; for there the prisoner was liberated upon security only, before the actual receipt of the money by the sheriff. The plaintiffs did not call for a return of the writ till after the commencement of this action. The only legitimate object of the process even by capias against the person is to secure to the plaintiffs the payment of what is due to them; which was done when the money was paid to the officer who was charged with the

(a) 1 *Ld. Ray.* 399.

execution

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execution of it. It is not a vindictive process, which it would be if the prisoner might still be kept in custody after satisfying the judgment. The sheriff must be considered as the agent of the plaintiffs for the purpose of receiving the money for them; and therefore so far as the prisoner was concerned, a payment to the sheriff must be considered the same as a payment to the plaintiffs themselves. In *Taylor* v. *Baker* (*a*), the payment was made by the prisoner to the marshal, who is in the same situation as any other gaoler; which is very different from the situation and authority of a sheriff, to whom the original writ of execution is directed, and who is to make his return to it: and it is admitted in this case, that payment to the sheriff upon a fieri facias would be a good discharge of the debt, and it is only doubted whether it would be so upon a capias ad satisfaciendum: yet there can be no distinction in substance between them, the object of both writs being to obtain the payment of the money due. But the Court there were not all agreed upon the point in judgment, though the majority held that the payment to the marshal could not be pleaded in bar to an action of debt on the judgment by the original plaintiffs, who had not received payment of their debt. [Lord *Ellenborough* C. J. There is another report of the case of *Taylor* v. *Baker* in *Freeman* (*b*), which points more clearly to the ground of the distinction in this respect between execution process against the goods, and against the person; stating that the writ of fieri facias authorizes the sheriff to levy the *money*, but the writ of capias ad satisfaciendum only authorizes him to bring the *body* into court.] *Morton*'s case (*c*) is to the same effect; but

(*a*) 2 *Mod.* 314. *T. Jones*, 97. (*b*) 453. (*c*) 2 *Show.* 139.

those

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those were actions of debt on the judgment between the original parties, between whom payment to a third person may not be pleadable in bar: but it does not follow that the discharge of the prisoner upon the payment to the sheriff may be treated as an *escape*. The statute 3 *G.* 1. *c.* 15. *s.* 17., in requiring the sum for which the defendant is to be taken in execution to be indorsed on the writ, before its delivery to the sheriff, recognizes his agency for the plaintiffs to receive the money. [*Bayley* J. That is for the purpose of ascertaining the poundage due to the sheriff on the levy.] The statute of *Westminster* 2. (*a*) on which the action of debt is founded, also recognizes an agency in the sheriff; for it is intitled "the Masters' remedy against their Servants and other Accomptants;" and it warns the sheriff to take heed not to suffer his prisoner to escape; otherwise "he shall be answerable to his master of the damages done to him by such his servant," &c. It would be inconsistent with this statute that the plaintiffs, by adopting another form of action against the sheriff, should be able to get rid of the agency thus recognized by the legislature. [*Bayley* J. He may be servant or agent to a certain extent, that is for the purpose of executing the writ: but here the objection is that he has not executed the writ.] The writ comes to the hands of the sheriff immediately from the plaintiffs' attorney, who sets him in motion.

Scarlett and *Barnewall*, contrà, were stopped by the Court.

(*a*) 13 *Ed.* 1. *c* 11. referred to by *Buller* J. in *Bunbury* v. *Walker*, 2 *Term Rep.* 126.

Lord

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Lord ELLENBOROUGH C. J. If the sheriff on the receipt of the money had immediately paid it over to the plaintiffs, before any action brought, perhaps an agency might have been intended; but here the plaintiffs have had no benefit whatever from their writ. By that writ he was commanded to take and keep the body of *Bromley*, so that he might have it on a certain day at *Westminster*, *to satisfy the plaintiffs* of their damages, &c.; but that he has not done; but has returned that he took and detained the prisoner until he satisfied *him* (*the sheriff*) the sum indorsed thereon for execution. This is not a compliance with the command of the writ. The sheriff is strictly no agent of the plaintiffs, but the officer of the court for the execution of its process, and he cannot substitute one mode of proceeding in lieu of another which he is commanded to pursue. No authority can be shewn to warrant the sheriff in levying upon the goods under a writ against the person. Then can the plaintiffs, who elected to take out their writ against the person of their debtor, have, by the mere act of the sheriff, his own responsibility substituted in the place of the body of their debtor? The best way would have been for the sheriff, after having fallen into the error he had committed, to have taken the earliest opportunity of moving the court to stay the proceedings, on payment to the plaintiffs of their original demand, and of all subsequent costs incurred, or bringing the money into court. I was too strongly impressed at the trial with the mischief and hardship of suffering a sheriff to detain a prisoner in custody after receiving full satisfaction of the demand against him; but he had strictly no authority under the writ to deliver him till the plaintiffs had received and accepted such satisfaction. The sheriff is only an agent for the plaintiffs

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plaintiffs for the limited purpose of executing the writ, and he must pursue the writ and be ready at the day, not with the money, but with the body, unless the party himself, who sued out the writ, interfere and agree to the liberation of the prisoner upon receipt of the money which has been paid to the sheriff. Here the sheriff took the money from his prisoner, but was not industrious to pay it over to the plaintiffs; they may therefore well complain against him for having set his prisoner at large before they were satisfied their demand, contrary to the exigency of the writ. If the sheriff therefore was a servant to them to a certain extent, he was not a good servant, and did not execute that which he was commanded to do. And the reason of the distinction between personal process and process against the goods in this respect is well pointed out in *Freeman's Report* of the case of *Taylor* v. *Baker*.

Grose J. was of the same opinion.

Bayley J. (*a*). It was the duty of the sheriff, upon a writ of capias ad satisfaciendum, to take and keep the body of his prisoner until payment of the money due to the plaintiffs, and not merely till payment to himself. If the sheriff therefore do receive the money, and do not pay it over immediately to the party entitled to receive it, but let his prisoner go at large, he does not pursue the command of the writ, and is guilty of an escape.

Rule absolute.

(*a*) *Le Blanc* J. was absent from indisposition.

CLARKE *against* HUTCHINS.

Friday, Nov. 8th.

A tradesman at one port receiving an order to forward goods to a person at another port, by a common sea carrier, does not sufficiently perform the order by depositing the goods at the receiving house of such carrier, with directions to be forwarded to their place of destination, if the goods, being much above the value of 5*l.*, to which the carrier's liability was notoriously limited, be not specially entered, and paid for accordingly; for such tradesman has an implied authority, and it is his duty to pay any extra charge necessary to insure the responsibility of the carrier to the party from whom he received the order, though only general in the terms of it: and in case of non-delivery by the carrier, whose responsibility was lost for want of such special entry and payment, the tradesman cannot recover the value of the goods against the person from whom he received the order.

THE defendant, who lived at *Gosport*, ordered goods from the plaintiff, who lived at *Plymouth*, and who sent them accordingly to the receiving house of a vessel trading for this purpose between the two places, the owners of which had published cards and sufficiently established a notoriety in the place, that they would not be answerable for any package above 5*l.* unless entered and paid for as such. The value of the goods sent in this instance was 51*l.*, but the plaintiff made no special entry or payment pursuant to the notice. The goods in fact were never delivered to the defendant, and no further account was given of them, and he refused to pay for them, on the ground that by the plaintiff's neglect in not making a special entry of them pursuant to the notice, he could have no remedy over against the carriers. Whereupon the plaintiff brought assumpsit for goods sold and delivered, &c., which was tried before *Graham* B. at *Exeter*, when the plaintiff insisted upon the delivery to the common carriers as an execution of the order on his part, and that he was not bound to incur any additional expence by making a special entry, without the direction of the defendant, to whom it properly belonged: the learned judge however was of a different opinion, and nonsuited the plaintiff.

Lens Serjt. now moved to set aside the nonsuit; contending that the plaintiff had strictly performed all that

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he had authority to do by the generality of the order, by having deposited the goods in the usual and ordinary way, to be forwarded by the common carriers. There was no evidence of any prior dealings between the parties, from whence a more special authority might have been implied to warrant the plaintiff in charging the defendant with an extra price for the carriage.

Lord ELLENBOROUGH C. J. The plaintiff cannot be said to have deposited the goods in the usual and ordinary way, for the purpose of forwarding them to the defendant, unless he took the usual and ordinary precaution, which the notoriety of the carriers' general undertaking required, with respect to goods of this value, to insure them a safe conveyance; that is, by making a special entry of them. He had an implied authority, and it was his duty to do whatever was necessary to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance, as that in case of a loss the defendant might have his indemnity against the carriers. The rest of the court assenting, the

Rule was refused

The KING *against* The Inhabitants of the County of DEVON.

Friday, Nov. 8th.

A new and substantive bridge, of public utility, built within the limit of one county and adopted by the public, is repairable by the inhabitants of that county, although it be built within 300 feet of an old bridge, repairable by the inhabitants of another county, who were bound in course, under the stat. 22 *H.* 8. *c.* 5., to maintain such 300 feet of road, though lying in the other county.

THE County of *Devon* is divided from the county of *Dorset* by the River *Yarty*, over which there is a bridge maintained by *Dorset*, the inhabitants of which in course under the stat. 22 *Hen.* 8. *c.* 5. maintained the road for 300 feet on the *Devonshire* side from the bridge, as part of such bridge. At the distance of 150 feet from the bridge on the same side, the road about 30 years ago led through a ford occasioned by a small stream which runs into the *Yarty*; but about that time, in order to avoid the inconvenience of the ford, a smaller bridge was built over it by an individual, which, having been generally used by the public ever since, was considered as having been adopted by the inhabitants of the county, according to the received rule of evidence in such cases. The smaller bridge having lately fallen into decay and requiring repair, the inhabitants of *Devon* were called upon to repair it; which they objected to, on the ground that being within 300 feet of the greater bridge over the *Yarty*, for which distance the county of *Dorset* was bound to maintain the road, as part of that bridge, the inhabitants of *Devon* were no more bound to repair the smaller bridge than they were to repair the road for that distance before that bridge was built, though lying within the limit of their county. Whereupon this indictment was preferred against them for the non-repair of the smaller bridge, and upon the trial at *Bridgewater*, in the adjoining county of *Somerset*, a verdict passed for the crown.

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Gifford now moved for a new trial on the grounds before ſtated, that by the ſtatute of *Hen.* 8. the 300 feet of road from the end of the great bridge was to be conſidered as part of the bridge itſelf; which was repairable, and had in fact been hitherto maintained, by the county of *Dorſet*; and if public utility required a ſecondary bridge within that diſtance, it muſt be conſidered as an appendage by law to the other. That if the inhabitants of *Dorſet* were not bound to repair this, as being a ſubſtantive bridge, maintainable by another county, they might equally claim to be relieved from the repair of the 150 intermediate feet of road lying on the *Devonſhire* ſide, or at leaſt of a proportion of it.

Lord ELLENBOROUGH C. J. Before the building of the new bridge the inhabitants of the county of *Devon* had the benefit of a certain portion of road within their own limit, repairable by the inhabitants of *Dorſet*, as an appendage to the old bridge. But inſtead of the old road over the ford, they choſe to have a new bridge of their own; but they cannot throw this additional burthen upon the inhabitants of *Dorſet*. Each is a ſubſtantive bridge in a different county, and the new bridge cannot be conſidered as an appendage to the other. The ſtat. of *Hen.* 8. attaches equally on the inhabitants of each county in reſpect to its own bridge. It makes no difference that the new bridge was firſt built by an individual, if it were afterwards adopted by the public, as of public utility. While it continued a road, it was repairable as part of the old bridge; but now that there is a ſubſtantive bridge built on the *Devonſhire* ſide, it is repairable as a bridge by the inhabitants of the county in which it is ſituated, according to the ſtatute.

Per Curiam, Rule refuſed.

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HULL *against* COOPER.

Saturday, Nov. 9th.

If a ship be insured at and from a certain place, where in fact she is not at the time, but arrives there, after some interval; (but the fact is not communicated to the underwriters, who do not call for information on the subject;) it is a question for the jury, whether the delay which intervened materially varied the risk; and they held it did not in a case where the insurance being effected on the 13th of *August* in *London*, on goods at and from *Heligoland* to the *Baltic*, the vessel did not sail from the *Thames* till the 27th, to which was to be added the further time for her reaching *Heligoland.*

THIS was an action on a policy of insurance on goods, at and from *Heligoland* to a port or ports of discharge in the *Baltic*, which was tried before Lord *Ellenborough* C. J. at *Guildhall*, when the plaintiff recovered a verdict. *Marryat* now moved for a new trial, on the ground of suppression of material information from the underwriters at the time of effecting the policy: this was done between the 8th and 13th of *August*, while the ship was lying in the *Thames*, from whence she did not depart till the 27th of the same month for *Heligoland* in ballast, where she afterwards arrived, and took in her loading for the *Baltic*, and sailed on the voyage insured, and was afterwards lost or captured. He contended that the underwriters ought to have been informed of the situation of the ship when the insurance was effected, as from the terms of it they might naturally conclude that the ship was then at *Heligoland*. But her being at that time in the *Thames*, from whence she did not sail till the 27th, (and some days more must have intervened before she reached *Heligoland*,) made a difference in the risk by protracting the voyage further into the winter season. He admitted that in the case of *Beckwith* v. *Sidebotham* (*a*), it had been ruled by Lord *Ellenborough* that such communications were not necessary to be made, unless particular information was called for by the underwriters. There the fact known to the assured, and not communicated to the underwriters at the time of effecting

(*a*) 1 *Campb. Ni. Pri. Caf.* 116. *M.* 48 *Geo.* 3.

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the policy, was that the ſhip, which, with her cargo, was inſured at and from a foreign port, (into which ſhe put in a diſabled ſtate,) homewards, was not in a condition to receive her cargo on board till ſhe had undergone conſiderable repair. But he contended that information of this nature ought more properly to come from the aſſured who knew the fact.

Lord ELLENBOROUGH C. J. When a broker propoſes a policy to an underwriter on a ſhip at and from a certain place, it imports either that the ſhip is there at the time, or ſhortly will be there; for if ſhe is only to be there at a diſtant period, that might materially increaſe the riſk. But it has never been underſtood that the terms of ſuch a policy neceſſarily imported that the ſhip was at the place at the very time, ſo as to make the aſſured guilty of deception if ſhe were not. It was a queſtion for the jury, whether the intervening period materially varied the riſk in this inſtance: the interval being from the 13th to the 27th of *Auguſt*, with the additional days which elapſed from her ſailing till ſhe reached *Heligoland*. And the jury were not perſuaded that the riſk was thereby varied, and found for the plaintiff.

GROSE J. agreed.

BAYLEY J. (a) It was a queſtion for the jury to ſay whether the delay in reaching *Heligoland* for ſo many days after the policy was effected materially varied the riſk.

Rule refuſed.

(a) *Le Blanc* J. was abſent from indiſpoſition.

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TAIT *against* LEVI.

Monday, Nov. 11th.

Where in a policy of insurance on a voyage up the *Mediterranean*, on the coast of *Spain*, the underwriters stipulated that they would not be liable higher up the *Mediterranean* than *Tarragona*, the assured could not recover where the captain of the ship, through entire ignorance of the coast, when the occasion and the terms of the policy required him to distinguish, went into *Barcelona*, an enemy's port, which is higher up than *Tarragona*; for this was either a deviation without any just cause, (and on this ground the plaintiff was held not entitled to any return of premium;) or there was a failure of an implied warranty on the part of the assured, that a captain and crew of competent skill and knowledge for the declared purpose of the voyage should be provided.

THIS was an action on a policy of insurance on the ship *Catherine* and goods, at and from *Cork* to the ship's loading port or ports on the coast of *Spain*, within the Straits of *Gibraltar*, including *Tarragona*, *and not higher up the Mediterranean*, during her stay there, and from thence to *London*; with liberty to discharge and take in goods at whatever place she might touch at, &c. *Tarragona* was then in possession of our *Spanish* allies, but *Barcelona*, another port of *Spain*, which lies further up the *Mediterranean*, was in possession of the *French* enemy. It was the intention of the captain to go into *Tarragona*, but a current, as he supposed, carried the vessel beyond it in the night, and the captain, being entirely ignorant of the coast, mistook *Barcelona* for *Tarragona*, and was entering the former port when he was captured by the *French*. The two towns were proved to be not at all alike in their appearance from the sea. Lord *Ellenborough* C. J. before whom the cause was tried at the sittings in *London*, was of opinion that the underwriters were not liable for this crassa negligentia or ignorantia on the part of the captain, which did not amount to barratry, as not being a wilful misconduct or fraud on his part; and therefore nonsuited the plaintiff.

The Attorney-General now moved to set aside the nonsuit; saying that it had never been decided that underwriters were not liable for any loss arising from the negligence or ignorance of a captain in this respect, which did not affect his capacity as a seaman to navigate the vessel,

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vessel, but merely his ignorance of the different towns on the coast on which he was navigating. It must often happen in the course of voyages that the captains of vessels are ignorant of the different coasts upon which they are navigating, and losses may accrue on that account; but the underwriters have never been held to be thereby absolved, for they even engage to be answerable for the misconduct of the captain.

Lord ELLENBOROUGH C. J. If such misconduct amount to barratry, the underwriters expressly engage to indemnify the assured against it. But here the whole and anxious object of the underwriters, for which they expressly stipulated, was that they should not be answerable for any risks higher up the *Mediterranean* than *Tarragona*; and, therefore the voluntary exceeding of that limit, through the ignorance of the captain, I consider as a deviation from the voyage insured, which discharged the underwriters. When the object of the contracting parties was to mark the real limits of the coast on which the vessel was navigating, and when the point of danger was so nigh at hand to the place to which the ship was bound, which was the utmost limit of the underwriters' engagement, there was great negligence in sending a captain who was totally ignorant of the coast, as it was in proof that he confessed himself to be. He only supposed that it was a current which carried his vessel beyond *Tarragona* in the night; but there was no proof even of that. There was then no just cause for the deviation; but it resulted solely from his ignorance. If he had been driven off *Barcelona* by stress of weather, it would have been a different consideration. I think the case against the assured, quâcunque viâ datâ; either on the

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ground of a deviation from the limits of the voyage described in the policy, without any juſt cauſe; or on the ground of an implied warranty to provide a maſter of reaſonably competent ſkill; which was not complied with by ſending out one who was totally ignorant of the one port and of the other, of *Tarragona* and of *Barcelona*, when it was the immediate and prominent object of the policy to diſtinguiſh between them.

GROSE J. concurred.

LE BLANC J. On my preſent view of the caſe, there appears to me to have been an incompetent fitting out of the ſhip with a proper maſter for the purpoſe of the voyage inſured. The ſhip was to be fitted out in an adequate manner to ſecure her from going higher up the *Mediterranean* than *Tarragona*, according to the expreſs intention of the parties; the owners ſhould therefore have put on board a captain of ſufficient ſkill to diſtinguiſh the port of *Tarragona* from the neighbouring ports on the coaſt; and if from his not knowing one port from another, he goes into an enemy's port inſtead of the port of *Tarragona*, which it was his duty to diſtinguiſh under this policy, there appears to me to be a want of ſufficient ſkill in the captain and crew for the purpoſe of the voyage inſured. But I am not prepared to ſay that in all caſes a captain carrying his ſhip by miſtake into another port than that to which he is bound, would neceſſarily be a deviation ſo as to avoid the policy. My opinion is formed on the ſpecial circumſtance of this inſurance.

BAYLEY J. I doubt much whether this caſe can be put on the ground of deviation, becauſe there was no in-

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tention in the captain to deviate, but he intended to go into *Tarragona*, though he miftook *Barcelona* for his intended port through his entire ignorance of the coaft. But upon the ground of want of competent fkill and knowledge of the coaft on the part of the captain, when the very object of the policy required difcriminating knowledge in that refpect; and there being no other part of the crew capable of fupplying that want of knowledge, and the lofs happening on that account, I am of opinion that the affured is not entitled to recover.

A queftion then arofe as to the right of the plaintiff to a return of premium, fuppofing the policy never to have attached, for breach of the implied warranty, and that the cafe did not turn upon the fubfequent deviation: but Lord *Ellenborough* C. J. faid, that on his prefent view of the queftion, he could not advife the premium to be paid into court; for if the captain, without juft caufe, got out of his prefcribed limits, he got out of the policy: and the majority of the Court appearing to concur in this, the rule was refufed generally.

Monday, Nov. 11th.

KLINGENDER *againft* BOND.

A wrong defcription of the perfon to whom a licence from the crown to trade with the enemy is granted invalidates it. As where he was defcribed to be "of *London*, merchant;" whereas he was refident at the time at *Heligoland*; from whence he paffed into *Germany*, intending to return immediately *and fettle in London*.

THE action was upon a policy of infurance made the 30th of *Auguft* 1810, on goods on board the fhip *Vrow Hendrika*, from *Heligoland* to the *Baltic*. At the trial before Lord *Ellenborough* C. J. at *Guildhall* the only queftion made was upon the licence granted under the exifting orders of council. The property was fhewn to belong to

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Lemcke of *Hanover*, and the ſhipment was made at *Heligoland* by an agent of his of the name of *Hampe*, who was deſcribed in the licence as "*Hampe* of *London*, merchant;" but in fact, though he was juſt about to leave *Heligoland*, where he had been reſiding ſome time, and to ſettle in *London*, he was not yet ſettled here. It was thereupon objected that the licence was void, as containing an incorrect deſcription of the perſon to whom it was granted; and his Lordſhip being of that opinion nonſuited the plaintiff.

The Attorney-General moved to ſet aſide the nonſuit, and argued that as the perſon was ſufficiently known who was a lawful object of the licence, the addition was not material. That upon application to the licenſing office, they did not conſider the circumſtance as of any conſequence. That licences were often granted to *A. B.* &c. *and other* Britiſh merchants; and no inquiry was made as to the other perſons for whom it was granted; though he admitted that they muſt connect themſelves with one or other of the perſons named. That it was clear that no fraud was intended in this caſe; but the deſcription was given as that by which he would be moſt likely to be beſt known, being then immediately about to ſettle in *London*.

Lord ELLENBOROUGH C. J. *Hampe* ſaid at the trial that his proper reſidence was at *Heligoland* at the time. That he reſided there from 1808 to 1809; that he then went to *Germany*, and intended coming to ſettle in *London* in the *March* following. How then can I ſay that he was properly deſcribed in the licence as a merchant of *London*? I am aware that inſtruments of this deſcription require

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KLINGENDER *against* BOND.

to be conſtrued with ſome latitude; but I am afraid of ſetting looſe all bounds of proper deſcription in them, and of breaking down general rules, if this were deemed ſufficient. This nonſuit does not bar the plaintiff's action, and upon another trial he may be prepared to tender a bill of exceptions, if ſo adviſed, to the judge who refuſes the evidence of the licence; but as I cannot think the nonſuit wrong, I dare not conſent to grant the rule. Should ſuch a deſcription be deemed not to invalidate the licence, there never will be a licence of this ſort that will deſcribe the perſon correctly, ſo much is ſought to be concealed in theſe matters.

Per Curiam, Rule refuſed.

Monday, *Nov.* 11th.

MOGGRIDGE *againſt* JONES.

A. having agreed to execute a leaſe of premiſes to *B.*, who was to pay a certain ſum for it; if *B.*, who was let into poſſeſſion, accept a bill for the conſideration-money, drawn on him by *A.*, it is no defence to an action on the bill by *A.* againſt *B.* that the former refuſed to execute the leaſe; but his remedy is on the agreement.

TO an action upon a bill of exchange for 200*l.* brought by the plaintiff, as drawer, againſt the defendant, as acceptor, the latter ſet up by way of defence, at the trial before Lord *Ellenborough* C. J. at *Weſtminſter*, that there was no conſideration for the drawing of the bill; for that the money for which it was drawn was agreed to be paid in conſideration of the plaintiff's executing a leaſe of certain premiſes to the defendant; which he had not yet done, and avowed at the trial that he never meant to do. The terms of the agreement in this reſpect between the parties were to this effect. Memorandum of an agreement made 20th *July* 1810. *E. Moggridge* agrees to let, and *J. D. Jones* to take (the meſſuage in queſtion, being a houſe in *Weſtminſter*) to hold from the 29th of *December* next for the term of 21 years, under the yearly rent of 120*l.* "*And the ſaid* E. Moggridge *for and in conſidera-*

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tion of 500l. *to be paid by* J. D. Jones *by three bills* to be drawn by *E. M.* and to be accepted by *J. D. J.* bearing date this day, to be payable thus, one bill for 200*l.* payable 8 months after date, &c. *doth hereby agree to execute a leafe of the faid meffuage for the faid term,*" &c. And *J. D. Jones* agrees to take the faid leafe at the faid yearly rent, &c. and execute a counterpart, &c. The defendant was immediately let into poffeffion of the premifes, and accepted the bill in queftion, with the other two, for the confideration money; after which the plaintiff refufed to execute the leafe. His Lordfhip however held this to be no anfwer to the action on the bill; but that the defendant had another remedy; and the plaintiff recovered a verdict.

Garrow now moved upon this ftatement of facts for a new trial, on the ground that as between thefe parties the true confideration for giving the acceptance might be entered into; and that fuch confideration was not the mere letting of the defendant into poffeffion, as the plaintiff now contended, but the performance of the agreement, by the actual execution of a leafe, which the plaintiff having fince refufed to do, the confideration had failed.

Lord ELLENBOROUGH C. J. The money agreed upon for the premifes would have been payable immediately, but for the convenience of the defendant the plaintiff agreed to take his acceptances at a future day. This bill muft therefore be paid in courfe when due; and the defendant will have his remedy upon the agreement for the non-execution of the leafe.

Per Curiam, Rule refufed.

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Monday, Nov. 11th.

DOE, Lessee of GRUNDY and Others, *against* CLARKE.

Where a pauper had been put in possession of a cottage 40 years ago, by the then existing overseers of the poor, and had continued in the parish pay, and the cottage had been from time to time repaired by different overseers till two years ago, when the pauper disposed of it to the defendant, and went away: yet held, that the existing overseers could not maintain ejectment for it, having no derivative title as a corporation from their predecessors, so as to connect themselves in interest with the overseers by whom the pauper was put in possession; and the pauper having done no act to recognize his holding under the demising sets of overseers.

CLARKE, in moving to set aside the nonsuit which had taken place in this case before *Thomson* B. at *Leicester*, stated the circumstances to be, that about 40 years ago a pauper of the name of *Brooks* was placed in the cottage for which this ejectment was brought by one of the then overseers of the poor, and had continued in possession till two or three years ago, when he disposed of the house to the defendant, (upon what terms did not appear) and went away. That during the time *Brooks* dwelt in the cottage, the parish officers from time to time repaired it, and he continued to receive parish relief. There were two demises, one by the existing overseers, and the other by their predecessors in the office at the time when *Brooks* quitted. The learned Judge at the trial, considering that the overseers of the poor were no corporation, and that, as overseers, they could have no legal title to the premises, and that there was no evidence of any acknowledgment by *Brooks* of holding under the former overseers, who had joined in the demise, nonsuited the plaintiff. But *Clarke* now contended that *Brooks* having been in possession under the first set of overseers, who must have been considered as his landlords, if he were not in the situation of a mere servant under them, could not in either view set up any title against their successors in office, who stood in the place of those from whom he received the possession.

Lord

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Lord ELLENBOROUGH C. J. If *Brooks* had done any thing to recognize his holding under the overseers, that might have done. But there being no evidence of that kind, how can the overseers, who are no corporation, make out a legal title in themselves to the premises, as overseers. There is no connecting the title of the present overseers with their predecessors who put *Brooks* into possession.

The other Judges concurred; and *Bayley* J. added, that neither of the sets of overseers demising had put *Brooks* in possession; nor had he done any thing to recognize holding under either of them.

Rule refused.

The Provost and Scholars of QUEEN'S COLLEGE, OXFORD, *against* HALLETT.

Monday, Nov. 11th.

An action on the case for an injury to the inheritance lies by the reversioner, pending the term, against the tenant, for inclosing and cultivating waste land included in the demise, and for continuing the grievance.

THIS was an action on the case for an injury done to the inheritance, in which the plaintiffs declared that they were seised in fee of a manor, farm and lands, with the appurtenances, at *Stoneham* in the county of *Southampton*, by reason whereof they were entitled to have for themselves, their farmers and tenants, occupiers of the said manor, farm and lands, with the appurtenances, common of pasture, upon a waste in *Stoneham*, &c. That the defendant held and enjoyed the said manor, &c. as tenant to the plaintiffs by virtue of certain demises thereof before made by the plaintiffs for the remainders of certain terms then and yet to come and unexpired, (the reversion of the said manor, &c. belonging to the plaintiffs and their successors, &c.) yet the defendant wrongfully intending

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The Provost, &c. of QUEEN'S COLLEGE, OXFORD, *against* HALLETT.

tending to injure the plaintiffs in their reversionary estate and interest in the said manor, &c. and to lessen the value thereof, and deprive them of the free use and enjoyment of the said common of pasture for themselves and their future tenants of the said manor, &c. whilst the plaintiffs were so seised of the said manor, &c. and entitled to such common of pasture as aforesaid; and whilst the defendant so held and enjoyed the said manor, &c. as tenant thereof to the plaintiffs, to wit, on the 1st of *January* 1801, and on divers other days between that and the 1st of *September* 1810, at the parish of *Stoneham*, &c. wrongfully erected fences and banks on parts of *Townhill* common, (the waste in question), and inclosed and separated part of it from the remainder, and also wrongfully subdivided the same into small inclosures, and kept and continued it so for a long time, &c., and wrongfully ploughed up and converted great part into tillage, &c., whereby the plaintiffs were greatly injured in their reversionary estate and interest in the said manor, &c. There was a variety of counts laying the case in different ways, some of which only charged the defendant with continuing the grievances.

It appeared at the trial before *Graham* B. at *Winchester*, that in 1797 the plaintiffs had leased the premises mentioned in the declaration to Mr. *Middleton* for 21 years, who conveyed the same to the defendant in 1809. During the time it was held by Mr. *Middleton* he inclosed and ploughed up the greater part of the common, and the defendant after his purchase inclosed nearly the remainder. It was objected by *Dampier*, that as the lease was unexpired, the action would not lie against the defendant, though it would against a stranger, because the defendant might yet, before the expiration of his lease, restore the premises to their former condition, and deliver

them

them up in that ſtate. The objection was however overruled, and the plaintiffs recovered a verdict with nominal damages. The ſame objection was now renewed by *Caſberd* on moving for a new trial. But the Court were all clear that the action lay for the preſent injury to the inheritance.

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Lord ELLENBOROUGH C. J. It is an injury to the title of the reverſioners, and a preſent damage to them. Lord *Mansfield* held that building a wall, where none was before, was ſufficient to entitle the reverſioner to this kind of action pending the leaſe, though it might be pulled down again before the leaſe expired.

GROSE J. Acts of this kind have been held over and over again to be a preſent injury to the eſtate of the reverſioner.

LE BLANC and BAYLEY, Juſtices, agreeing,

Rule refuſed.

WESTON *againſt* FOURNIER and Another.

Tueſday, Nov. 12th.

In treſpaſs againſt magiſtrates for an act done by them ex officio, the plaintiff muſt ſhew at niſi prius that he proceeded upon a writ ſued out within ſix months after notice to them of the action, although there be a continuing cauſe of action; and therefore the plaintiff muſt ſhew a return and continuance of the firſt writ if the ſecond be out of the time fixed by the notice.

THIS was an action of treſpaſs againſt magiſtrates, which was tried before Lord *Ellenborough* C. J. in *Surry*, and the only queſtion was whether the action was brought in time. The arreſt of the plaintiff under the warrant of the defendants was on the 21ſt of *November* 1808, and he continued in cuſtody up to laſt

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WESTON *against* FOURNIER.

July, when he was discharged. The writ of latitat was sued out on the 20th of *May* 1809; and the next process proved was an alias writ sued out on the 6th of *February* 1810, and the memorandum of the record of nisi prius was of *Hilary* term 1810. The notice of action to the magistrates was on the 10th of *March* 1809. It was objected at the trial that as the first writ in *May* 1809 was not returned, and there was no proof of the service of that writ, the alias writ in *February* 1810, which appeared to be after the memorandum of the nisi prius record, could not be connected with it in continuance, and therefore that the action, which must by the statute (*a*) be commenced and prosecuted within six months after the cause and notice of action, was out of time: and his Lordship being of that opinion nonsuited the plaintiff.

E. Lawes now moved to set aside the nonsuit, and contended that where the action was brought in time, it was immaterial whether it had been regularly continued, and that no question of that kind could be entered into at nisi prius, where all the prior proceedings must be taken to have been regular. In *Harris* v. *Woolford* (*b*), where the return of the first writ was held necessary to be shewn, to save the statute of limitations, the declaration was not delivered till much more than a year after that writ issued, and therefore could not have been taken to be a proceeding upon it without shewing its return. [*Bayley* J. The case of *Stanway* q. t. v. *Perry* (*c*) presses most.] There the last writ was out of time for the cause of action, and therefore unless it were connected with the first writ, which was in time, the

(*a*) 24 *Geo* 2. c. 44. and see *Lovelace* v. *Cr*

(*b*) 6 *Term Rep.* 617. (*c*) 2 *B.* & *Pull.* 157.

action

action was not properly commenced: but here was a continuing cause of action down to the time of the second writ. [*Bayley* J. Notice on the 10th of *March* fixed the plaintiff to the trespass on which he meant to proceed, and he was bound to proceed within six months after that notice; and then the second writ was out of time, as in the former case.]

Lord ELLENBOROUGH C. J. The plaintiff was bound to commence his action within six months after his notice; and he did sue out a writ within that period; but he never served it, and there was no return to it: he sued out another writ, which he did serve; but that was out of time. The memorandum does not help him.

GROSE J. agreed.

LE BLANC J. The notice fixed the plaintiff to a date from which the subsequent proceedings were to be reckoned: if no notice had been necessary, there might have been ground for the argument.

BAYLEY J. The suing out of the second writ was at least primâ facie evidence that the first had not been served. In *Stanway* v. *Perry* both the writs were in the same term; but the production of the second raised a presumption that the first had not been served; and the first writ only being in time, it became necessary to shew its return.

Rule refused.

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Tuesday, Nov. 12th.

LYNCH and Another *against* DUNSFORD, in Error.

An infurance was effected on goods on board *fhip or fhips* from the *Canary Iflands* to *London*; and at the time the affured's agent, who effected the policy, knew that one of the *fhip or fhips* was named the *Prefident*, and at the fame time there was a paper of communication ftuck up at *Lloyd's*, that "the *Howard, Marfh*, arrived off *Dover* from *Teneriffe*: failed 24th ult.; on the 27th, off the *Salvages*, fell in with the *Prefident, Owens*, from *Lanzarette*, deep and leaky:" But the agent did not communicate his knowledge of the fhip's name to the under-writers: held that the policy was thereby avoided, though the intelligence afterwards turned out to be falfe.

THE plaintiffs brought their action in the court of Common Pleas, and declared in the common form againft the underwriter, upon a valued policy of infurance made on the 26th of *November* 1808, by *R. Jones* as agent, as well in his own name as for all perfons interefted, on goods on board *fhip or fhips* at and from all or any of the *Canary Iflands* to *London*, for a premium of 10 guineas *per cent*: and the plaintiffs for whom the policy was effected, averred that goods to the value of the fum infured were then laden on board of divers fhips, to wit, on board a fhip called the *Prefident*, and two other fhips called the *Anna Margaret* and *Friendfhip*, to be carried upon the voyage infured; and that the *Prefident*, and the other fhips afterwards, on the 26th of *October* 1808, failed with the goods on board from the *Canary Iflands* on the voyage infured; and though the *Anna Margaret* duly arrived with her cargo at *London*, yet that the *Prefident*, with a great part of the faid goods on board, was captured as prize during the voyage, and the *Friendfhip*, with other part of the goods on board, after failing, was wrecked and loft by the perils of the fea at one of the *Canary Iflands*. On non affumpfit pleaded, the jury, at the trial before Lord C. J. *Mansfield*, at *Guildhall*, found a fpecial verdict in fubftance as follows.

The plaintiffs were interefted to the full amount of the goods infured; and the only lofs they fought to recover was confined to the value of the goods fhipped on board the *Prefident*, which failed from the *Canary Iflands* on the voyage infured on the 28th of *October* 1808, and

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was captured in the *British Channel* by a *French* privateer on the 18th of *November* 1808, and thereby totally lost. On the 22d of *November* 1808 a paper writing, as follows, was stuck up at *Lloyd*'s Coffee House: "The *Howard*, "*March*, arrived off *Dover* from *Teneriffe*: failed 24th "*ultimo*: on the 27th off the *Salvages* fell in with the "*President*, *Owens*, from *Lanzarrette*, and parted from her, she being deep and leaky." It did not appear by whose authority or direction such paper was stuck up; but the information it professed to communicate, as far as it related to the said ship the *President*, was *unfounded and false*: the *President* was neither deep nor leaky during any part of the voyage insured, but on the contrary was in a perfectly sea-worthy condition at and from the time of sailing until and at the time of her capture. *When the policy was effected R. Jones knew that such paper-writing was on the board at Lloyd's: He also knew that the said ship*, THE PRESIDENT *was one among others of* "THE "SHIP OR SHIPS" *whose cargoes were intended to be insured by this policy*; the same being a continuation of other policies on the same interest: *and he had a bill of lading in his possession, by which he was informed that part of the interest insured by this policy* per SHIP OR SHIPS *was loaded on board the* President; *and* R, Jones *did not, at the time the defendant underwrote the policy, inform him that part of the goods insured by such policy had previously been shipped on board the* President *for the voyage insured.* But whether on the whole the defendant undertook and promised as alleged in the declaration, the jury submitted to the court, and found accordingly; estimating the damages at 104*l.* 11*s.* (upon the defendant's subscription of 200*l.*) if the plaintiff were entitled to recover. And in last *Hilary* term the court of Common

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Pleas, after argument, gave judgment for the defendant; on which this writ of error was brought.

Pell Serjt. in support of the plaintiff in error, observed that no fraud was found in the agent, in not making the communication of the supposed intelligence to the underwriters, and therefore none was to be presumed. Here the intelligence was not true, nor did it appear to rest on any authentic ground; and a person effecting an insurance cannot be obliged to communicate every idle rumour circulated upon no responsibility. The only cases bearing any similitude to this are those of *Da Costa* v. *Scandrett* (*a*) and *Seaman* v. *Fonnereau* (*b*). It may be collected from the first that the ship was captured, and that the assured had doubtful intelligence of that event, which not having communicated to the underwriters, it was held to avoid the insurance: but the fact was true. In the other, the assured's agent had received intelligence which gave reason to fear that the ship was lost in a gale of wind; which however was not correct; but she was soon afterwards captured: and the withholding from the underwriters of the intelligence received was deemed to avoid the policy. There the intelligence was partly true; the ship was leaky, and there was a hard gale the day after she was met with at sea; all which it was important for the underwriters to know. But here the intelligence being false, if the party were still bound to communicate it, he is made the instrument of increasing his own premium without any real cause. Suppose there was a rumour of this sort which the assured knew to be false, would he still be bound to communicate it? Then where it is a

(*a*) 2 *P. Wms.* 170. (*b*) 2 *Stra.* 1183.

mere

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mere rumour, resting upon no probable authority, may he not take his chance of the event? If it turned out to be true, the policy would be avoided; if false, it would be immaterial.

Lens Serjt., contra, was stopped by the Court.

Lord ELLENBOROUGH C. J. The question is whether the assured's agent was bound to communicate to the underwriters a material fact within his own knowledge, as coupled with the report made relating to the supposed risk they were about to insure, which report afterwards turned out not to be true. Now the duty of the assured or his agent in making such communications of material circumstances within their knowledge must attach at the time of effecting the insurance, and cannot depend upon the subsequent event. There is no case perhaps exactly like this in species, but others have been decided involving the same principles, that the assured is bound to communicate to the underwriters every thing material to the risk within his knowledge at the time. Here, coupling the peculiar knowledge which the agent had of the name of the ship, on board of which the goods were loaded, with the information contained in the paper stuck up at *Lloyd's*, it cannot be said that the fact was not material to be communicated to the underwriters. With the knowledge of such a fact kept back from them, can they be said to have contracted upon equal terms? The intelligence announced in the paper at *Lloyd's* was nothing to the underwriters, unless they had the means of applying it to the particular ship or goods in which the assured were interested. If the underwriters had had the knowledge possessed by the assured, it might have been a question with them whether

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they would have insured at all; or if they did, whether they would not have required an enhanced premium.

Bayley J. The assured's agent is blameable, not for not communicating the rumour, but for not communicating to the underwriters a fact material with reference to that rumour, which fact was within his knowledge, so as to enable them to apply it to the rumour, and exercise their judgment accordingly. As to the assured taking the chance of the event upon himself; he did not tell the underwriters of the fact within his knowledge, and that he was willing to take that chance upon himself, but he took the chance of their finding out his knowledge of the fact, if it afterwards turned out to be true.

Per Curiam, Judgment affirmed (*a*).

(*a*) Vide *Fitzherbert* v. *Mather*, 1 *Term Rep.* 12.

Tuesday, Nov. 12th.

Graham *against* Jackson.

Under a contract to purchase 300 tons of *Campeachy* logwood, at 35*l.* per ton, &c. to be of real merchantable quality; and such as might be determined to be otherwise by impartial judges to be rejected; the vendee is bound to take so much of the wood tendered as turned out to be of the sort described, at the contract price; though it appeared at the time that a part, which was afterwards ascertained to be 16 out of the 300 tons, was of a different and inferior description.

THE defendant contracted to purchase, and the plaintiff to sell, a certain quantity of *Campeachy* logwood, and the memorandum of the contract in the broker's *bought and sold* notes was in substance as follows:— Bought of the plaintiff "300 tons of *Campeachy* logwood, shipped at *New York*, at 35*l.* per ton, by approved bills at 4 months. The wood to be of real merchantable quality. Such as may be determined to be

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otherwife by impartial judges to be rejected," &c. An action having been brought by the plaintiff againft the defendant for the non-performance of this contract, the Defendant having refufed to accept any part of the logwood, becaufe, as he alleged, the whole was not *Campeachy* logwood; and Lord *Ellenborough* C. J. having been of opinion, at the trial at *Guildhall*, that the defendant was bound to take that which was *Campeachy* logwood; it was agreed to refer the caufe to an arbitrator to decide what was *Campeachy*, and the fum due to the plaintiff for the fame; and he found that 284 out of the 300 tons were *Campeachy*, and awarded the defendant to pay to the Plaintiff the contract price of 35*l.* per ton upon that quantity, to the amount of 9,940*l.*

The Attorney-General now moved to fet afide the award, and argued that till it was afcertained how much of the 300 tons was *Campeachy* and of a real merchantable quality, the defendant could not tell to what amount he was to give the bills; it being now admitted that the whole quantity did not correfpond with the contract. He therefore contended that the defendant was not bound by the contract price for a part only of the ftipulated quantity, and that the arbitrator ought not to have allowed the full contract price for that which was *Campeachy*, but only the difference between the contract price and what the article would have fold for at the time when the true quantity of *Campeachy* logwood to be paid for by the defendant was afcertained.

But *the Court* were of opinion that the arbitrator, who was put in the place of the jury, had done right in giving the contract price for the quantity found to be *Cam-*

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GRAHAM *against* JACKSON.

peachy; the defendant having repudiated the whole contract, and refused to accept any part of the logwood when it was first offered to him; and that the plaintiff had a right to stand upon the contract.

Rule refused.

Tuesday, Nov. 12th.

SANDERSON *against* BOWES and Others.

A promissory note of the defendants', promising to pay so much *at their banking-house at W.* requires a demand of payment *there*, in order to give the holder a cause of action, if it be not paid.

THE plaintiff declared in assumpsit upon a promissory note, as bearer thereof, against the defendants as the makers; and stated in his first count that whereas *M. F.* (one of the defendants), for himself and the other defendants, heretofore, to wit, on the 1st of *September* 1808, *at Workington*, in the county of *Cumberland*, to wit, at *London*, &c., according to the form of the statute, made a certain note in writing commonly called a promissory note, and thereby on demand promised to pay *at the banking-house there*, to wit, *at Workington* aforesaid, to one *R. Nelson* or bearer, the sum of 1*l.* 1*s.* value received; and the plaintiff afterwards, to wit, on the same day and year aforesaid, at *London*, &c. duly became, and before and at the time of the exhibiting of this bill was, and still is, the bearer of the said note; whereof the defendants afterwards, to wit, on the day and year aforesaid, at *London*, &c. had notice; by reason of which premises, and by force of the statute, &c. the defendants became liable to pay, to the Plaintiff the said sum of money in the said note specified, *according to the tenor and effect* of the said note. And being so liable, the defendants, in consideration thereof, afterwards, to wit, at *London*, &c. undertook and promised the plaintiff to pay him the said sum of money in the said note specified, *according to the tenor and effect* of the said note. There were several other counts on similar notes, and also the common counts for

money

money paid, money had and received, and upon an account stated; and then the declaration concluded—Yet the defendants, not regarding their said several promises and undertakings so by them in manner and form aforesaid made, &c. have not yet paid the said several sums of money, &c. to the plaintiff, *although often requested:* but the defendants to pay the same, or any part thereof, have hitherto *altogether refused*, and still do refuse, to the damage of the plaintiff of 30*l.*, &c. The defendants demurred generally to all the counts on the promissory notes, and pleaded the general issue to the money counts.

Richardson in support of the demurrer. This case is not affected by the late determination of this Court in *Fenton* v. *Goundry* (*a*), which was the case of an acceptance; for an acceptance is no part of the original bill of exchange; the acceptor coming in collaterally to the bill, and being at liberty to accept it or not as he pleases. There is no decision of the Court therefore on this point, and the only case that bears against the plaintiff is that of *Wild* v. *Rennards* (*b*), where *Bayley* J. held that if a promissory note were made payable at a particular place, there was no necessity for proving that it was presented there for payment in an action against the maker: but it does not appear there that the place of payment was incorporated in the note. [*Bayley* J. As far as I recollect, the place was not incorporated in the note, but was mentioned in a memorandum at the foot of it.] In *Saunderson* v. *Judge* (*c*), the principal point decided was that the note need not be presented to the party himself, but that a presentation at the place pointed out in the note as the place of payment

(*a*) 13 *East*, 459.
(*b*) Sittings in *Hil.* term 1809, cited in 1 *Campb.* 425.
(*c*) 2 *H. Blac.* 509.

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SAUNDERSON *against* BOWES.

was sufficient: and as to what was said concerning the memorandum being part of the contract or not, it was extrajudicial. But there also it appeared that the place of payment was not incorporated, as here, in the body of the note, but in a memorandum at the foot of it. Other cases of this description were tried on the last Northern circuit, some at *Carlisle*, and others at *Lancaster*, in all of which *Wood* B. held that application for payment was necessary to be made at the place where the notes were made payable. At *Lancaster*, he said that he had considered the subject again since the trial of the first cases at *Carlisle*, and was quite satisfied that application should be made at the place of payment mentioned. If it be considered on principle, there is nothing to prevent parties from making their contracts in what form they please, and the terms of them must be abided by. He then referred to a class of cases collected by Mr. Serjt. *Williams*, in a note on *Birks* v. *Trippet*, 1 *Saund.* 33., where a distinction is taken between a promise to pay a mere duty upon request, which needs no actual request; and a promise to pay a collateral sum upon request, where there must be an actual request: but *the Court* said that he need not labour that point. He observed that the principle of all those cases was that where the request was part of the contract, it must be averred in the declaration and proved. Here then it appears that a request of payment at the particular place named in the note is necessary to give the cause of action, because both the request and the place are part of the contract. A banker has a particular place where all his money is deposited, and where all his clerks are prepared to answer demands upon him; and there is no rule of law to restrain him from making his notes payable at that particular place, and not elsewhere. He cannot be prepared to pay all his notes at any other place

place where he may happen to be at the time, and the inconvenience would be exceſſive if he were liable to be called upon elſewhere.

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Holroyd contrà. Upon a contract of this nature it is not neceſſary to allege any ſpecial requeſt either as to time or place. The eſſence of the contract is a promiſe to pay the money every where, and the action itſelf is a ſufficient demand. It may be admitted that this is diſtinguiſhable in the form of the contract from the late caſe of *Fenton* v. *Goundry* (*a*), but it muſt be governed by the ſame principle. Would not an indorſer upon default of the makers be liable to pay the note any where? The diſtinction is well taken in the caſes referred to in the note in *Saunders*, that where a plaintiff ſues for a duty and not for a collateral ſum, he need not allege a ſpecial requeſt: but here the plaintiff ſues, not for a collateral ſum, but for a debt due; for it is expreſſed to be for *value received:* the party to whom the note is made payable might have brought an action for money had and received. Where an acceptor engages to pay money at a day certain, no ſpecial requeſt is neceſſary to be alleged or proved; neither is it in the caſe of a drawer: why then ſhould it be otherwiſe where the promiſe ſtated is to pay at a particular place? In the caſe of a bond, where a condition is ſtated to do a particular thing, the penalty is not ſaved by the obligee not having done ſomething which he engaged to do, unleſs his omiſſion obſtructed the obligor and prevented him from doing the act, and he did all he could towards the performance of it. The caſes upon this ſubject are collected in 2 *Com. Dig.* title *Condition*, L. 4, 5. [*Bayley* J. looking over the caſes collected under

(*a*) 13 *Eaſt*, 459.

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der the same title G. 9. referred to one which says that if a place certain be limited for payment, the party is not bound to pay it any where else (*a*).] A tender and refusal is equivalent to payment against the suit of the party; but where the obligation is to pay to a third person, a tender and refusal will not save the bond. If the obligor engage to go to a particular place to pay the money, he must go there with it, and the bond is not saved if he do not, though the obligee were not at the place ready to receive it. If the condition of the bond be that the obligor will enfeoff the obligee of certain land on a particular day, it is not sufficient in an action on the bond for the obligor to say that the obligee did not attend at the day, but the obligor must shew that he went to the land and executed the feoffment, and was ready to have delivered seisin, but that the obligee was not there to receive seisin. So in covenant for non-payment of rent, the lessee may plead that he went on the land on the day, &c. ready to pay the rent, and that no one came to receive it on the part of the lessor. This therefore is at most matter of defence. Where a party promises to pay money at a particular place, he may not be bound to pay it elsewhere; but it comes properly by way of defence for him to shew that he was ready at the time and place to pay the money, and that the plaintiff was not there ready to receive it. [Lord *Ellenborough* C. J. Those are cases where money is to be paid, or something to be done at a particular time as well as place; therefore the party may readily make an averment that he was ready at the time and place to pay, and that the other party was not ready to receive it: but here the time of payment depends entirely on the pleasure of the holder of the note.] In 1 *Roll.*

(*a*) For this is cited 1 *Rol. Abr.* 445. l. 52. 444. l. 7.

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Ab. 443. l. 20. is a cafe of an engagement to deliver goods at *Rotterdam* upon requeft; and the Court held that a requeft at *Rotterdam* was not neceffary, but might be made elfewhere. This being *a duty*, no fpecial requeft was neceffary, but the action is a fufficient requeft; and there is a breach of the promife by non-payment on fuch demand. And as to the place, it is matter of defence for the defendant to plead that he was always ready to pay at the banking-houfe at *Workington*. It is no part of the plaintiff's caufe of action, which is the breach of the promife to pay the money, but a matter of defence to be pleaded, that the defendant was ready at all times at the place ftipulated to make the payment. A plea of tender alone would not be fufficient in thefe cafes without bringing the money into court, which transfers the payment to another place. [It having been fuggefted that there was a general refufal alleged at the conclufion of the declaration which might include a refufal at the banking-houfe at *Workington* as well as elfewhere; he obferved that there being no time or place alleged to fuch refufal, he could not, without a particular venue laid, argue that it was an allegation of a refufal to pay there. And *Bayley* J. obferved that a refufal alleged generally did not imply a refufal at the particular place.]

Richardfon in reply. The diftinction taken in the cafes between a promife to perform a duty, (in which cafe the law raifes the promife,) and a collateral promife, does not apply to a cafe like this where there is a fpecial contract; where the duty only refults from the previous performance of certain acts by the party feeking to enforce it. A promife to perform a duty, where no requeft

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is necessary, is where the consideration being executed, the promise is raised by law from the actual situation of the parties. [Lord *Ellenborough* C. J. This is a duty created by the instrument itself, with certain limits and qualifications: the duty did not arise anterior to the instrument.] The holder must abide by the note itself, and that is formed upon a qualified promise. Cases on bonds are very different from the present: most of the instances are of bonds conditioned to do something at a particular time; but these notes come into the bank at all times at the pleasure of the holder, and the bankers are and can only be ready to pay them at the particular place. Where a contract is in its nature conditioned and qualified, the party availing himself of it must shew that he has done all that lies on him to do by the terms of it. As to its being laid generally, that the defendants refused to pay; the mere omission is a refusal in law, and no proof of a special request. The application for payment at the banking-house is a condition precedent, the performance of which the plaintiff must shew, otherwise his declaration is substantially bad, and may be taken advantage of on general demurrer. The cases are collected in the notes in 1 *Saunders* 32; amongst others *Batch* v. *Owen* (*a*), and *Morton* v. *Lamb* (*b*); to which may be added *Andrews* v. *Hopwood* (*c*). In the last of these cases it was held in an action against the drawer (*d*) of a bill, that a demand at the particular place was a condition precedent; and that was in fact decided on general demurrer, because all the special causes of demurrer were overruled.

(*a*) 5 *Term Rep* 409. (*b*) 7 *Term Rep.* 125. (*c*) 2 *Taunt.* 61.

(*d*) The case of *Callaghan* v. *Aylett*, 2 *Camp. N. P. Cas* 549, 550. extended this rule to the case of an acceptor.

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Lord ELLENBOROUGH C. J. This case is materially different from that of *Fenton* v. *Goundry*, lately decided by this Court; which was the case of a bill drawn generally, but accepted payable at a particular place; which special acceptance we considered merely as importing the intention of the party, that he would be found when the bill became due at that place as his house of business, where he should be prepared to pay it. There the acceptance payable at the place was no part of the original conformation of the bill itself; but here the words restrictive of payment at the place named are incorporated in the original form of the instrument, which alone creates the contract and duty of the party. This is not like cases cited of duties which are transitory with the person; but here the duty is to be performed, and the money is made payable, at a specific place, viz. the defendants' banking-house, at *Workington*. Under such circumstances a demand there by the holder is a condition precedent, in order to give himself a title to receive the money. Neither is it like the case of bonds with conditions, where the party is originally liable to the sum named in the bond; and he is to found his defence, and relieve himself against the payment of the penalty, by shewing performance of the condition: that must come from him by way of defence: but here the defendant's duty was limited by the instrument itself, and nothing was demandable of him but upon the instrument. If the action for money lent or money had and received would lie merely upon the evidence of the note in question, let the plaintiff bring such an action: but this action upon the note will not lie, unless the plaintiff has demanded payment at the appointed place. And I cannot but say that it is very convenient that

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fuch a condition fhould be incorporated in the note itfelf; for it would be very inconvenient that the makers of notes of this defcription fhould be liable to anfwer them every where, when it is notorious that they have made provifion for them at a particular place, where only they engage to pay them. Then if the requeft at the place be a condition precedent, it fhould have been averred, and for want of fuch an averment the declaration is bad. But I ftill think that this is diftinguifhable from the cafe of *Fenton* v. *Goundry*.

GROSE J. This is a promife to pay at the defendants' banking-houfe at *Workington*, but the defendants could not pay the note there if the holder did not apply there for payment, and therefore the non-payment of it was the fault of the holder himfelf. The defendants only made a fpecial engagement to pay the note at their banking-houfe, and they did not engage to pay it elfewhere: a requeft then was neceffary to be made at the banking-houfe to give a caufe of action; and there being no averment in the declaration that a requeft was made there, the action will not lie.

LE BLANC J. The plaintiff had no other engagement with the defendants than upon this note, by which the defendants promife to pay fo much on demand at *Workington*: there was no antecedent duty owing from them, but their duty arifes folely upon the inftrument, and therefore the Court muft look at the inftrument in order to fee what that duty was. Now by the terms of it the holder of the note muft bring himfelf to the place, and demand payment there, before he can entitle himfelf to receive the money: it is ftrictly therefore a cafe of a condition precedent, of which the plain-

tiff muſt aver performance in order to bring himſelf within the defendant's promiſe, and is different from the caſes on bond, where the party is to diſcharge himſelf from the penalty by ſhewing performance of the condition: but here the plaintiff, not having entitled himſelf within the terms and meaning of the inſtrument upon which he ſues, cannot recover.

BAYLEY J. In the caſe of a bond the defendant is liable to the debt, unleſs he bring himſelf within the ſaving of the condition: it lies therefore upon the defendant in that caſe to ſhew that he has done all required by the condition in order to excuſe himſelf from the penalty. But in aſſumpſit upon a contract the plaintiff muſt ſhew that he has done every thing that lay upon him to do, in order to bring himſelf within the contract, and entitle him to ſue upon it. Now here the terms of the contract are a promiſe by the defendants to pay on demand at a certain place: then the plaintiff muſt bring himſelf within thoſe terms, by ſhewing that he made a demand upon the defendants at that place; and the defendants cannot be made liable beyond the terms of their contract, which is to pay at *Workington*. Where a perſon contracts generally to pay a ſum of money, he is liable to the creditor every where; but where a perſon binds himſelf even by bond to pay at a particular place, there he is not liable at any other place, and the demand muſt be made upon him there. So here the defendants, having contracted to pay on demand at a particular place, are not liable but upon a demand at that place.

Judgment for the defendants.

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A bond with a condition, reciting that the principal obligor, with his sureties, became bound as collector of certain duties assessed under the stat. 43 *G.* 3. (*c.* 122) to the commissioners acting for the district under that statute, for the due collection and payment of those duties to the receiver-general, could not, it seems, be enforced if the statute referred to did not authorize the collection of those duties, though in fact the collector had received sums from the subjects as and for such duties. But that statute authorizing the duties to be assessed and collected "under "the regulations of any act *to be* passed in the same session of parliament for *consolidating certain of the* "*provisions contained in any act or acts relating to the duties under the management of the com-* "*missioners for the affairs of taxes*," &c. was held to speak the language of the legislature as from the commencement of, and with reference to, the whole session, and to relate to a *prior* act, with the title referred to, passed in the same sessions, (*c.* 99), and indorsed accordingly with a prior date, by virtue of the stat. 33 *Geo.* 3. *c.* 13.

And such bond may be put in force against one of the sureties, though he were not apprized of the default of the principal collector in not paying over duties collected by him, nor called upon for an indemnity by the commissioners, till after the dismissal from office of such collector.

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TO debt on bond dated 6th of *March* 45 *Geo.* 3. whereby the defendant and *John Mellish* became jointly and severally bound with *Joseph Watkin* to the plaintiffs in the penal sum of 2000*l.*, the defendant pleaded non est factum; and the plaintiffs had oyer of the condition, which ran thus: "Whereas the above bounden *J. Watkin* being desirous of becoming one of the collectors of the parish of *St. Pancras* within the division of *Holborn*, in the County of *Middlesex*, of the rates and duties charged and assessed under and by virtue of an act made and passed in the 43 *Geo.* 3. (*a*), intituled, "An act for granting to his Majesty, until the 6th day "of *May* next after the ratification of a definitive "treaty of peace, a contribution on the profits arising "from property, professions, trades, and offices," hath offered himself, together with the above bounden *Daniel Rowles* and *John Mellish*, as security for the said parish, for collecting and paying of the said rates and duties pursuant to the directions of the said recited act: and whereas the above named *J. Nares* and *E. Pepys* are two of the commissioners acting in the execution of the said act for the division: now the condition of this obliga-

(*a*) *C.* 122.

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tion is ſuch, that if the ſaid *J. Watkin ſhall well and truly demand the ſeveral rates and duties, in the ſaid act reſpectively mentioned*, of the reſpective perſons within the ſaid pariſh charged therewith, *according to the directions of the ſaid act*, and proceed in default of payment to recover the ſame by due courſe of law, *and pay the ſame over to the Receiver General or his Deputy*, in manner directed by the commiſſioners acting within the ſaid diviſion *in the execution of the ſaid act*; then this obligation to be void." The plaintiffs then ſuggeſted a breach of the condition that *J. Watkin* from the making of the ſaid writing obligatory until the 20th of *September* then next following was and continued to be *one of the collectors* of the pariſh of *St. Pancras*, within the diviſion of *Holborn*, in the county of *Middleſex*, *of the rates and duties charged and aſſeſſed under and by virtue of the ſaid act* of the 43 *G.* 3., intituled as aforeſaid, (*i.e. c.* 122); and that he, as ſuch collector and during that time, to wit, on the 6th of *March* 1805, and on divers other days between that day and the 20th of *September* then next following, at *Weſtminſter*, *&c.*, did demand and receive divers ſums, amounting in the whole to 1200*l.*, *as and for certain rates and duties in the ſaid act reſpectively mentioned*, from divers perſons within the ſaid pariſh reſpectively charged therewith: yet the ſaid *J. Watkin* did not, nor would, although requeſted, pay over the ſaid ſeveral ſums of money ſo received by him as aforeſaid, or any part thereof, to the Receiver General of that part of the county of *Middleſex* where the ſaid pariſh of *St. Pancras* is ſituate, or his deputy, in manner in that behalf directed by the commiſſioners acting within the ſaid diviſion of *Holborn*, in the execution of the ſaid act of parliament, or otherwiſe howſoever; but wholly refuſed and made default, &c.

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This cause was tried before Lord *Ellenborough* C. J. at the sittings after *Michaelmas* Term 1808, in *Middlesex*, when a verdict was taken for the plaintiffs on the issue joined, and the jury assessed damages to the amount of 506*l.* 19*s.* 2*d.*, subject to the opinion of the Court on the following case.

The plaintiffs are two of the commissioners duly appointed for executing the general purposes of the act of the 43 *G.* 3. *c.* 122., within and for the *Holborn* division in the county of *Middlesex*. *J. Watkin*, in the condition of the bond named, was on the 10th of *February* 1805 appointed to collect the rates and duties *charged and assessed under and by virtue of the said act* for the year 1804, in the parish of *St. Pancras*, within the division of *Holborn*, in the county of *Middlesex*: none of the duties for that year having been until then assessed: and on the 6th of *March* 1805 the defendant and *J. Mellish*, as the sureties of *Watkin*, executed the bond on which this action is brought. *Watkin* immediately proceeded to collect the taxes by virtue of such appointment, and between the time of executing the bond in question and the *September* following, he collected 1114*l.* 14*s.* 10*d.*, out of which he paid to the Receiver General, including the poundage due to him, 607*l.* 15*s.* 8*d.*, leaving a balance due from him of 506*l.* 19s. 2*d.* He was called upon by the commissioners, and directed by them to pay over the said balance to the Receiver General; which he refused to do, and was thereupon dismissed from the said office of collector, and is a defaulter to that amount; and to recover the last mentioned sum this action is brought. The plaintiffs, bewcen the time of executing the bond and the *September* following, had knowledge that *Watkin* had made default in not paying over sums of money collected by him

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him to the Receiver General; but gave no notice thereof to the defendant *Rowles* and *Mellish*, or either of them, until after the revocation of *Watkin*'s appointment as such collector. *Watkin* had no lands, tenements, goods, and chattles, whereby his deficiency or any part thereof could have been satisfied (*a*). If the plaintiffs were intitled to recover, the verdict was to stand; otherwise, a nonsuit was to be entered.

This case first came on for argument in *Easter* term last, when *Reader*, for the plaintiffs, was stopped by the Court; and *Heywood* Serjt. for the defendant, was called upon to support his objections to the action; which he stated to be, first, that this bond could have no operation at all under the act of parliament on which it professed to be founded, viz. the statute 43 *Geo.* 3. *c.* 122; for that act gives no power to levy assess or collect the rates in question, but only enacts by section 2. that the duties thereby granted shall be "assessed, &c., and collected "under the regulations of any act *to be* passed in the present session of parliament, *for consolidating certain of the* "*provisions contained in any act or acts relating to the duties* "*under the management of the commissioners for the affairs of* "*taxes, and for amending the said acts, &c.*" This act was passed on the 11th of *August* 1803, and no subsequent act of the kind referred to was passed in any subsequent part of the session; but an act, with the title described in this section, was passed in the prior part of the session, viz. on the 27th of *July* 1803; which is the act of the 43 *Geo.* 3. *c.* 99. The second objection was that if the bond were valid, the defendant, who is the surety, was at all events discharged by the laches of the commissioners

(*a*) Vide stat. 43 *Geo.* 3. *c.* 99. *f.* 13.

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ſioners in not enforcing the bond againſt the principal in due time, and in not giving due notice to the ſureties of the default of the principal. But

Lord ELLENBOROUGH C. J. ſaid that the attention of the Court had only been called by the marginal note in the paper book to the queſtion, whether the commiſſioners had been guilty of any laches in diſmiſſing the collector before they called upon the ſureties for payment; but he was ſatisfied that they had done perfectly right in diſmiſſing the collector as ſoon as they had diſcovered his delinquency; and on that ground the caſe would not admit of argument. The collector might, for ought that appeared, have been guilty of default on the 31ſt of *Auguſt*, and the commiſſioners might have diſmiſſed him on the 1ſt of *September*. With reſpect to the other objection, if any, it appeared upon the record. *The Court* thereupon directed the poſtea to be delivered to the plaintiffs. And *Park* on a ſubſequent day in the term moved to arreſt the judgment upon the objection firſt mentioned; the bond appearing by the condition to have been taken upon the ſtatute 43 *Geo.* 3. *c.* 122., which did not authorize the taking of any ſuch ſecurity for the raiſing of the duties in queſtion. A rule to ſhew cauſe was granted, which having ſtood over till this term, cauſe was now ſhewn by

Reader for the plaintiffs; who contended, firſt, that the bond was warranted by the act of parliament; or if it were not, ſtill it was not a void ſecurity at law. The objection made is altogether critical: the act of the 43 *G.* 3. *c.* 122. *ſ.* 2., directs the duties thereby granted to be aſſeſſed and collected under the regulations of any act *to be* paſſed in that ſeſſion with a certain title. This was a mere ſlip in the expreſſion; for the act referred

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to as one *to be* paſſed had then actually paſſed, and is claſſed as chap. 99. in the acts of the ſame ſeſſion, and no other act paſſed in the ſame ſeſſion having a ſimilar title, or containing proviſions with any reference to this act; and the act claſſed as *c.* 99. has the very title referred to in the act claſſed as *c.* 122. It is probable that the two acts were paſſing through the Houſe of Commons at the ſame time, and that when ſection 2. of the latter act was framed, the act *c.* 99. had not paſſed, and was not intended to receive the royal aſſent until after the other. Chap. 99. *ſ.* 3. alſo refers to new duties which might thereafter be placed under the management of the commiſſioners for the affairs of taxes, *to be* aſſeſſed under the regulations of that act. It being clear, therefore, that the two acts refer to each other, perhaps the words *to be* might be rejected as inapplicable, and the words of chap. 122. be read, "any act *paſſed* in the preſent ſeſſion of parliament." [Lord *Ellenborough* C. J. Is there any occaſion to reject thoſe words at all? Why may not the words "any act to be paſſed in the preſent ſeſſion," &c. be taken with reference to the commencement of the ſeſſion?] They ſurely may. But ſecondly, even ſuppoſing the act was a void authority for this purpoſe, yet the bond would not be void; for the commiſſioners, in diſcharge of their truſt, might well take ſuch a ſecurity, that the duties which were actually collected ſhould not be loſt, but might be preſerved in order to pay them over to thoſe who ſhould be found ultimately entitled to receive the money. If the act had ſaid that any bond taken otherwiſe than according to another act *to be* paſſed ſhould be void, that might raiſe a queſtion. The breach aſſigned is not that the collector did not receive or collect the rates, but that having collected

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them, he did not pay over the money. It was competent for him to enter into a bond to pay over voluntary payments made to him; although if the public had refused to pay the rates, he might not have been able to have enforced payment.

Heywood Serjt. contrà. As to the second objection, it appears clearly from the condition of the bond, that it was taken from the defendant as surety for one who was collector, for the parish of *St. Pancras*, of certain duties charged and assessed under the act of the 43 *G.* 3. *c.* 122. and in that character only: unless therefore the act gave authority to assess and collect the duties, he was no collector, and could not be subject to any obligation for not paying money over to the plaintiffs in that character, which was obtained by extortion. With respect to the first point, no words of reference to a future act to be passed can be stronger than those contained in *s.* 2. of *c.* 122., and they cannot admit of any construction referring to the beginning of the session; for the stat. 33 *G.* 3. *c.* 13. expressly says that all acts shall only relate to the day on which they receive the royal assent, unless some other commencement be given. [Lord *Ellenborough* C. J. There is no question as to the relation of this act to the day on which it is marked as having passed; but the sole question is upon the meaning of the words, " any act *to be passed* in that session."] The words *to be* passed must have relation to the 11th of *August*, the day on which the act did pass, and from which it speaks. [*Bayley* J. That is the day named for the purpose of the operation of the statute.] The natural construction of the words is future; the Court cannot tell that the legislature did not intend at the time to pass another statute with reference to this

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in the same session. [*Le Blanc* J. There is no other act in the session but *c.* 99. which can give any effect to *c.* 122., and *c.* 122. will be a dead letter unless it be connected with *c.* 99.] Even taking the two acts together it would not make a perfect whole, because the broken part of the first year 1803 is unprovided for by *c.* 99, and therefore the legislature must have looked to some future act to compleat the whole; for the Court cannot presume that the legislature referred to an imperfect act. If *c.* 99. were the act referred to, the times of appealing and of surcharging were gone by. [Lord *Ellenborough* C. J. According to this argument, it is immaterial whether *c.* 99. was passed prior or subsequently to *c.* 122.] He then referred to a late case of *Rex* v. *Minithorpe*, where the construction of these acts came in question; and upon a similar objection being taken, the defendant was never brought up for judgment: but *Reader* observed that there were other objections in that case: and *the Court* said that the point had never been decided.

Lord ELLENBOROUGH C. J. This is a motion to arrest the judgment in an action on a bond taken to secure the due collection and payment over of public duties under an act of parliament; which act, it is contended, never authorized the collection of any such duties. I should be very sorry to find it established in argument, that a public revenue of several millions had been wrongfully collected from the subject; but though that should be the consequence, yet if it were established, the Court would ill discharge their duty if they did not look that and every other consequence in the face in pronouncing judgment on the question when brought before them,

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them, if they ſhould find themſelves obliged to pronounce the bond to be a nullity. Looking at the condition of this bond as it appears upon the record, I cannot ſay that if the rates were collected without any authority, the collector could be called upon to pay them over; becauſe he would be anſwerable to the individuals from whom he had illegally received the money, and would be entitled to retain it for his own indemnity. But the queſtion is whether the words of *c.* 122., "any act *to be* paſſed in the preſent ſeſſion of parliament," are not ſatisfied by any act anſwering the deſcription referred to, paſſed in the ſame ſeſſion, though prior in point of time, ſuch as *c.* 99. The ſeſſion is a period of time of which, at the time of the legiſlature's ſpeaking thoſe words, a conſiderable portion had paſſed, and a further portion was yet to come. The ſeſſion is a thing of continuity; and therefore when the legiſlature ſpeak of any act *to be* paſſed in that ſeſſion, they mean any act that ſhall be paſſed from the commencement to the concluſion of the ſeſſion, embracing both the paſt and future portions of it. If that be the fair conſtruction, then the act which had paſſed in the antecedent part of the ſeſſion is embraced by the reference contained in the latter act, though they may ſtill not make a complete ſyſtem when connected together. The words in queſtion mean any act of that ſeſſion, and chapter 99. was an act of the ſame ſeſſion; and there can be no doubt from the title, and the object of that act, that it was the act in ſubſtance referred to by *c.* 122. In referring the words to the whole period of the ſeſſion, we violate no rule of grammar: they may fairly be taken to mean any act which, at the expiration of that ſeſſion, ſhall have been paſſed

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for the purpofe; and with reference to the whole feffion from its commencement, it is an act to be paffed in that feffion.

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GROSE J. I am of the fame opinion; and if we were to give the act in queftion any other conftruction, we fhould undo all that the legiflature meant to enact. There is no doubt of the juftice and honefty of the cafe, and I agree with the conftruction which my Lord has put on the words: my mind revolts at any other conftruction, which would illegalize every thing the legiflature meant to do.

LE BLANC J. By the condition of the bond it is recited that one of the obligors applied to the commiffioners to be appointed to collect the duties within their diftrict, under a certain act which is defcribed in the condition, which appears to be the act claffed as chap. 122. in the 43 *G.* 3. Of courfe, unlefs he could be legally appointed collector under fuch act, and could receive duties under it, the bond cannot be enforced: and that brings it to the queftion whether that act, which of itfelf does not authorize the collection of the duties, can be connected with another act paffed in the prior part of the fame feffion, viz. cap. 99., which authorizes the collection of the duties, and the payment over of the fums collected to the Receiver-general. The principal obligor was appointed under the act, chapter 122., which authorizes the duties to be collected under the regulations of an act *to be* paffed in the fame feffion, of the defcription therein mentioned; and chap. 99., authorizing the collection of the duties, was paffed in that feffion, but had received the royal affent before the act

c. 122.

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c. 122, and is fo marked in the ftatute-book, in confequence of another act of parliament directing that the particular time of paffing each act fhall be marked upon it. The operation, therefore, of the act *c.* 122. could only begin from the date affixed on it. But it is objected that the act *c.* 99. is not the ftatute referred to by the fubfequent act: it is fo, however, exprefsly, by reference to the title; and the queftion is whether the words *to be* paffed neceffarily tie down the reference to fome act to be paffed, which fhould receive the royal affent at a fubfequent period of the feffion; or whether they do not refer to any act which might be paffed in the fame feffion? And I conceive that they refer to any act which in the progrefs of the feffion, from the beginning to the end of it, would come within the defcription of an act to be paffed in that feffion: the words are fo ufed in common parlance, and may receive that conftruction according to the rules of grammar; and therefore I am of opinion that this is a valid bond.

BAYLEY J. The words, "any act *to be* paffed in the prefent feffion," &c. do not neceffarily mean after the 11th of *Auguft*, the day from which the act *c.* 122. was to commence its operation; and I think it means "any act of the prefent feffion;" and that that is the true conftruction which ought to be put upon thofe words in all cafes: for though an act do not commence in operation till the day it is paffed, when it receives the royal affent, it may be confidered as in its progrefs through the two houfes of parliament from the firft day of the feffion, and therefore the language of it will have reference to that time. We know that acts are frequently a long time in paffing through the two Houfes in fucceffion, and much injuftice would arife in many cafes from read-

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ing the language of an act with reference to its paſſing through either Houſe excluſively; but it muſt be read with reference to its progreſs generally. The ſt. 33 *G.* 3. *c.* 13. does not provide that the acts paſſed ſhall not be deemed to be acts of the whole ſeſſion, but that they ſhall not take effect ſo as to commence in operation till the paſſing of them; and then it enacts that if no other commencement ſhall be provided, every act ſhall operate from the day of the date indorſed when it received the royal aſſent. Then apply this to the inſtance before us. By an act generally of the whole ſeſſion the legiſlature have provided that from the 11th of *Auguſt* 1803 ſuch and ſuch things ſhall be done. I therefore refer their language to the firſt day of the ſeſſion, and read it, that the duties ſpoken of ſhall operate according to an act *to be* paſſed during the ſeſſion for a certain purpoſe; and I find that an act did paſs during the ſeſſion for that purpoſe, bearing the ſame title as is referred to in the act *c.* 122., to which I think that act meant to refer.

Rule diſcharged.

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Friday, Nov. 15th.

ROBERTSON and Others *against* HAMILTON.

The ship *Rofs*, belonging to the plaintiffs, and the ship *Atlantic*, (on which this queftion arofe) to *Fifher* and Co., and the cargoes to other perfons, were infured on a former voyage, and captured by the *Spaniards*, and carried into *Spain*; and the underwriters upon the *Atlantic*, *of whom the defendant was one*, paid as for a total lofs. But while proceedings for condemnation were pending in the Prize Court in *Spain*, *Cowan* (refiding there) having been feverally empowered by the different owners to claim reftitution, and to enter into compromife with the captors for giving up part of the cargoes on the reftitution of the remainder and of the fhips, and to defray all cofts and charges thereon, *and to forward the fhips* and goods reftored *to London*, and to pay all demands on the fhips and goods, agreed with the captors, fubfequent to the ceffation of hoftilities, (and the captures and fubfequent peace were held in the Court of Admiralty here to bind the property captured,) that upon giving up to them part of each cargo, the reft and the fhips fhould be *reftored for the common benefit of the original owners of both fhips and cargoes, in the lump*. On which *Cowan* advifed the plaintiffs that he fhould confign the *Atlantic* to them, with their own fhip, the *Rofs*, and draw bills on them, (which were afterwards accepted and paid), for the *general expences* of effecting the arrangement with the captors, and for the outfit of *both fhips*; and referred to this information to guide them with refpect to *infurance*: on which the plaintiffs infured the *Atlantic* by a policy "on fhip, or on falvage charges, or on any intereft as may "be hereafter declared by the affured;" and after a fubfequent capture of her by the *French*, declared againft the defendant, (who had alfo underwritten this fecond policy) *and averred the intereft to be, 1ft, in themfelves, and 2dly, in* Fifher *and Co.*, the original owners of the fhip *Atlantic*. And held that the plaintiffs had an infurable intereft; as well on account of the whole property captured (of which they owned the other fhip *Rofs*) having been reftored at the facrifice of part of the cargoes, for the common benefit of all; which created in them a *hotchpot intereft* in the fhip *Atlantic*; and alfo as reprefenting *Cowan*, who was empowered to act as attorney for all the original owners, and to whom fuch reftitution in hotchpot was made for their common benefit, and who had incurred charges and drawn bills on the plaintiffs on account of the common concern, which had been accepted and paid by them; and *Cowan* having had authority to infure from *Fifher* and Co, the original owners, under their order, on obtaining reftitution, *to forward the fhip to* London, and to pay all claims and demands on her. Though the plaintiffs would be amenable out of the money recovered to the feveral perfons interefted, in proportion to their feveral claims on the property in hotchpot, and amongft others to the defendant himfelf, as an underwriter on the firft policy, upon which he had paid as for a total lofs to *Fifher* and Co.

THE plaintiffs declared in affumpfit upon a policy of affurance effected by them and fubfcribed by the defendant, for 2000*l.*, upon the 13th of *January* 1809, upon the fhip *Atlantic*, at and from *Corunna* to *London*. The intereft was laid in the firft and fecond counts to be in the plaintiffs, and the lofs averred in the firft to be by perils of the enemy; and in the other by barratry: and in the third count the intereft was laid to be in *Fifher*, *Kidd*, and *Waring*, and the lofs averred to be by perils of enemies. There was alfo a count for money had and received. At the foot of the policy there was a

memo-

memorandum, declaring the insurance to be "on ship, "or on salvage charges, or on any interest as may be "hereafter declared by the assured." The cause was tried before Lord *Ellenborough* C. J. at Guildhall, when a verdict was found for the plaintiffs for 200*l.*, subject to the opinion of the Court upon the following case.

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ROBERTSON *against* HAMILTON.

In *May* 1808 the ship *Atlantic*, of which *Fisher*, *Kidd*, and *Waring* were then and still are the registered owners, together with the ship *Ross*, belonging to the plaintiffs, sailed from *Jamaica* loaded with produce for *England*, and both the ships and their cargoes were insured by the respective owners: the *Atlantic* being insured by a valued policy for 6500*l.*, underwritten by the defendant for 500*l.*, and her freight being insured by another valued policy for 4000*l.*, which was also underwritten by the defendant for 500*l.* In the course of their voyage they were both captured by a *Spanish* privateer and carried into *Spain*, where the restitution of the ships and cargoes was claimed on behalf of the *British* owners; but the capture being previous to the cessation of hostilities between *Great Britain* and *Spain*, the claim was resisted by the captors. Upon the capture, the underwriters were called upon to pay and did pay a total loss to the assured upon the two policies upon the ship *Atlantic* and her freight. Mr. *Cowan*, of *Corunna*, acted as well on behalf of the plaintiffs, as of *Fisher*, *Kidd*, and *Waring*, and also for the owners of both the cargoes, in endeavouring to recover the ships and cargoes in *Spain*: and in order to ratify his proceedings, powers of attorney were duly executed by the original owners of the ships and cargoes, one of which powers was executed by *Fisher* and Co., as the owners of the *Atlantic*, and by the original owners of

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her cargo, on the 5th of *January* 1809; and being delivered to the plaintiffs, was by them transmitted to *Cowan*. This power of attorney authorized him to appear and claim restitution of the ship and cargo, and to prosecute such claim in such manner as he should think advisable, and also to enter into any agreement or compromise with the captors for giving up part of the cargo of the said ship upon the restitution of the remainder, and to pay any sums or appropriate part of the said cargo to obtain restitution of the said ship, and upon obtaining such restitution of the ship and cargo, to defray all costs and charges, and also *to forward the said ship* and cargo, or such part of her cargo as should be restored, *to the port of London*, and to adjust, settle, and pay any claim or demand on the ship, goods, or merchandizes (*a*). An agreement had been previously entered into by *Cowan* with the captors in *December* 1808, subsequent to the cessation of hostilities between *Great Britain* and *Spain*, by which they agreed to deliver up to him, *for the common benefit of the original owners of both ships and cargoes*, the two ships and part of the cargoes of each, in consideration of all claim to the remainder of the cargoes being abandoned by the owners; and this restitution was declared to be in favour of the owners of the ships and cargoes *in the lump*. In consequence and upon the terms of this agreement, the two ships and the part of their cargoes agreed upon were delivered up to *Cowan*, and he proceeded to refit the ships in *Spain*, and drew bills upon the plaintiffs *for his general expences in effecting this arrangement*, and afterwards *in the outfit of both the ships*; which bills the plaintiffs accepted and paid. By letter,

(*a*) There was a general reference to the power reserved, and also to the agreement after-mentioned.

dated

dated the 23d of *December* 1808, and which was received by the plaintiffs on the 9th of *January* 1809, *Cowan* wrote to the plaintiffs (inter alia): "You will understand that *the whole property restored is to form a mass*, "and the reparation made agreeably to the respective "values that may be affixed to both ships and cargoes. "The *Atlantic* I shall consign to you, in order to simplify the concern; and you can arrange with the "owners. The above information will guide you *with* "*respect to insurance.*" In consequence of this letter, the plaintiffs effected the insurance in question. *Fisher* and Co. did not authorize this insurance otherwise than as aforesaid. The *Atlantic* was at *Corunna* in *January* 1809, preparing for her voyage to *London*, when the *French* entered that place and captured her. On the 16th of *February* 1810 the *Atlantic* arrived in *England*, in the possession of Mr. *Thomas Lewis*, and was arrested on the 20th of the same month by process of the Court of Admiralty, and claimed in the said court by *Fisher* and Co. as the original owners thereof: but upon the hearing of the cause on the 6th of *November* following, that Court determined that their title was devested by the first-mentioned capture and subsequent peace with *Spain*, and directed the warrant of arrest to be superseded. *Cowan* claims a commission for his said services. The premium has not been paid into court. The question was whether the plaintiffs were entitled to recover on any and which of the counts of the declaration, either for a total loss, or to a less amount, or for a return of premium. If they were entitled to recover for a total loss, the verdict was to stand: if only entitled to recover for the salvage expences, money laid out in refitting the ship, or commission, the verdict was to be subject to a

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reference as to the amount: If the plaintiffs were not entitled to recover, a nonsuit was to be entered.

Taddy, for the plaintiffs, made three points: 1st, whether they had any insurable interest: 2dly, if any, to what extent; whether it exceeded the amount of the bills accepted by them: and 3dly, whether, if the plaintiffs had no interest in themselves, they had sufficient authority to insure for *Fisher*, *Kidd*, and *Waring*, the registered owners, and to recover in their names. The first point has been decided in *Lucena* v. *Crawford* (a), and other cases. [Lord *Ellenborough* C. J. Independent of that case, can there be any doubt but that the plaintiffs had an insurable interest? The ships and cargoes were all thrown into hotchpot; and the plaintiffs had an interest in the conjoint property, and had expended their own money upon it, and were further authorized to make the insurance by *Cowan* of *Corunna*, who had full powers of attorney from all the original owners of the property.] 2dly, The plaintiffs had an insurable interest to the whole extent of the insurance, as well on account of their conjoint interest in the whole of the property which was restored in the mass for the benefit of all concerned, as in their character of consignees of the ship and cargo from *Cowan*; having also accepted and paid bills for the expences and outfit of this ship conjointly with the other property restored. The plaintiffs would clearly have had a lien on the ship if it had come into their possession. *Cowan* acted on behalf of the former underwriters, as well as of the other persons interested, in authorizing the plaintiffs to insure: for by the express terms of the

(a) 2 *New Rep.* 269.

policy,

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policy, the affured, whofe agent he was, are conftituted agents for the underwriters, in cafe of lofs, to do the beft for them: and he having compromifed with the captors, and incurred refponfibility for the outfit of this fhip, is entitled to be indemnified through the medium of the plaintiffs. Before falvage can be diftributed, the expence of it muft be deducted. No doubt the plaintiffs will be anfwerable over to the other perfons interefted in the mafs of the property reftored, for their proportions of the money to be recovered in this action: but however a court of equity may deal with the interefts of thofe feveral parties, the only queftion in a court of law is whether there was a promife by the defendant, and a good confideration for it. Admitting upon this contract that the refpective parties can only recover to the extent of their lofs, yet this Court will not now go into an entangled account of the different interefts, but will leave the diftribution of the money recovered on this policy to the plaintiffs, who, as truftees for all concerned, would have been in poffeffion of the property if it had arrived fafe, and anfwerable over to them. In *Boehm* v. *Bell* (*a*), the refponfibility alone of captors to anfwer over for the value of fhips feized as prize was held to conftitute an infurable intereft, though reftitution was afterwards awarded by the Court of Admiralty. [Lord *Ellenborough* C. J. That was a cafe of refponfibility coupled with poffeffion.] Here there would have been a lawful poffeffion, if not intercepted by the fubfequent capture: a tortious poffeffion indeed could not conftitute an infurable intereft. If the defence here fet up could avail at law, it would difturb the whole proportion of falvage,

(*a*) 8 *Term Rep.* 154.

 according

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according to the agreement of the parties in this case. This defendant also claims salvage upon the other policies, but non constat that he will be entitled to so large a proportion of salvage on those policies as his subscription on the policy in question amounts to. [*Le Blanc* J. Is not this the case of trustees in possession, through the medium of *Cowan*, at the time of the insurance, of property for the benefit of others; with a principal claim of their own upon that property; and while it continued in *Cowan's* possession, he was entitled to retain it for that claim.] While a party has a right to the possession, he has the legal property though defeasible; but defeasible property is insurable; for a defeasible interest in captors was held insurable in *Sterling* v. *Vaughan* (a). 3dly, If the Court should consider that the plaintiffs' right to recover was confined to a strict legal interest, that must be admitted to be in *Fisher*, *Kidd*, and *Waring*, the registered owners, from whom the plaintiffs, through *Cowan* of *Corunna*, had sufficient authority to insure, by the power of attorney executed on the 5th *January*, and delivered by *Fisher* and Co. to the plaintiffs to be transmitted to *Cowan*. This power gave him authority to take all steps necessary for the preservation of the property, and *to forward it to London*, and consequently gave authority to *Cowan* to direct the plaintiffs to insure; which they did on the 13th of *January*.

Richardson, contrà, contended, 1st, that the plaintiffs had no insurable interest; or, if any, that it did not exceed the extent of the salvage expences. 2dly, That *Fisher* and Co. had no insurable interest; because a total

(a) 11 *East*, 619.

loss

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loss having been paid to them by the first set of underwriters, all beneficial interest in them passed to those underwriters, and their legal interest was devested before this insurance was made by the first capture and subsequent peace with *Spain*, as appears by the judgment of the Court of Admiralty upon their claim for the possession of the ship in question. And that even if *Fisher* and Co. had a bare legal interest remaining in them by the operation of the registry acts, that would not authorize the plaintiffs to insure for them. [*Bayley* J. observed that it did not appear for what reasons the Court of Admiralty had decided on the claim of *Fisher* and Co. in the manner stated: but the fact of that court having so decided, on the ground stated in the case, was confirmed by the Attorney-General, who was of counsel in this cause.] A mere consignee, as such, has no insurable interest; though a consignee of goods, who has made advances or accepted bills on the credit of them, has an insurable interest to that extent, according to *Hill* v. *Secretan* (*a*), and *Wolff* v. *Horncastle* (*b*). But the case of a ship is widely different from that of the cargo, unless there be a power to sell the ship, which did not exist in this case. [*Bayley* J. Could not the plaintiffs have instituted a suit in the court of Admiralty in their own names, to detain this ship till payment of *Cowan*'s bills which they had accepted, and thereby put themselves in the place of *Cowan*?] Supposing that a person, who renders meritorious service and incurs expences for the delivery of a ship by way of salvage, could maintain a suit against the ship in the court of Admiralty for reimbursement, it does not follow that he could convey that right to another. [*Bayley* J.

(*a*) 1 *Bos. & Pull.* 315. (*b*) *Ib.* 316.

Were

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ROBERTSON *against* HAMILTON.

Were not the advances in fact made here by the plaintiffs?] All the original parties constituted *Cowan* their agent for their separate interests; but *Cowan* thought proper to throw the whole into hotchpot. It cannot however be said that expences incurred for one set of parties can be thrown by an agent upon others who had no prior interest in common with each other in the subject-matters: that expences incurred for the liberation of the ship *Atlantic* can be thrown upon the owners of the ship *Ross*. It may now indeed be difficult to adjust the proportions of each; but that cannot vary the question of right. At any rate the plaintiffs, who only accepted *Cowan*'s bills, thereby giving personal credit to him, cannot be entitled to sue for salvage expences incurred by him. The ship insured never was in their possession, and therefore they could have no lien upon it. [Lord *Ellenborough* C. J. This is no question strictly of lien. *Cowan* was in possession of the whole, and *Cowan* continued to be the plaintiffs' agent for this purpose after the *Atlantic* and the *Ross* were thrown into hotchpot for the benefit of all concerned. The whole then became a new property, and a new interest was constituted in the former several owners conjointly; so that the proprietors of the ship *Ross* thereby came to have an interest in the *Atlantic*. Upon the arrangement made with the captors, *Cowan* received restitution of the whole property *in the lump*, as it is said; for the common benefit of the original owners of both ships and cargoes. And then *Cowan*, being such agent of the conjoint interest, as well as agent for the plaintiffs, consigned the *Atlantic* to them, and drew bills upon them for the general expences of the whole concern, which they accepted and paid. If this does not give them an insurable interest, it is difficult to

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ſay what will.] Still, however, the underwriters upon this policy would only be liable for ſuch a proportion of the expences as, upon an adjuſtment and final balance of the account, would appear to belong to the owners of the *Atlantic*: that was the principle upon which the caſe of *Wolff* v. *Horncaſtle* (*a*) proceeded: the agent there was only held to have an inſurable intereſt to the extent of his advance upon the property conſigned, but not for the whole of it. Then as to the clauſe in every policy which gives the aſſured authority, in caſe of a loſs, to ſue, labour, and travail for the underwriters; that is only for the purpoſe of diminiſhing, if poſſible, the loſs which the underwriters ſhall be called upon at laſt to pay; but after they have paid as for a total loſs, the authority ceaſes. [Lord *Ellenborough* C. J. Surely it muſt in many caſes continue even after the loſs is adjuſted here; and is not countermanded by the mere act of payment; as where the loſs happens at a diſtance from home; otherwiſe the authority would be often wholly nugatory.] Then as to the averment of intereſt in *Fiſher*, *Kidd*, and *Waring*; except for the regiſter acts, upon payment of the whole value of the ſhip by the underwriters under the firſt policy, the property would have been deveſted out of the original owners and veſted in thoſe underwriters; and this, whether there was a formal abandonment or not. But now, though the legal intereſt may remain in them till a conveyance and new regiſtration, yet they muſt be taken to be truſtees for the underwriters from whom they have received a total loſs. And ſuppoſing the legal property in the *Atlantic* to remain in *Fiſher* and Co., there was no authority from them to the

(*a*) 1 *Boſ.* & *Pull.* 316.

 plaintiffs

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plaintiffs to insure her. The contrary is rather to be collected from *Cowan*'s letter of the 9th of *January* 1809 to the plaintiffs, wherein he tells them that he had consigned the *Atlantic* to them in order to simplify the concern; and they were to arrange with the owners; and that the information he had before given them would guide them with respect to insurance. It is found as a fact in the case, that *Fisher* and Co. no otherwise authorized the insurance than as might be inferred from the facts before stated. But they neither ordered it originally through *Cowan*, nor did they afterwards adopt it when made by the plaintiffs. Besides, the interest was devested out of them by the *Spanish* capture and subsequent peace: it was so adjudged by the Court of Admiralty, having competent authority to decide that question. But if this were a hotchpot interest, such interest ought to have been averred in all the former owners of the property.

Lord ELLENBOROUGH C. J. The plaintiffs, having an insurable interest in the whole mass of the property restored, may recover upon this policy as trustees for those who are interested with themselves in the whole; though they may be afterwards called upon to divide it amongst the several claimants in the proportions due to each; and a recovery in this action will not exclude any of the parties from unravelling the account in equity. If we were not accustomed in this place to handle questions amongst the apices juris, it would appear extraordinary that this should be considered as a gambling policy within the statute, in which the plaintiffs had no real interest, when it is stated in the case that they are the owners of one of the captured ships, and that after the mass

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of the captured property had been redeemed by the sacrifice of a part for the benefit of the whole, they expended their own money in securing the whole concern, which had been brought into hotchpot. In what sense can we consider the plaintiffs as gamblers? They were the original owners of the ship *Ross*; *Fisher* and Co. were owners of the *Atlantic*; and others owned the cargoes: both the ships with their cargoes were captured and carried into *Spain*, and there was a total loss of the whole property. The owners of the *Atlantic* thereupon received from their underwriters as for a total loss upon ship and freight; but that did not preclude the assured and their agent, after the capture, from suing and labouring to obtain restitution: and the respective owners of the ships and cargoes sent out powers of attorney to *Cowan* at *Corunna* for that purpose. In particular it is stated that the owners of the *Atlantic* and her cargo empowered him to prosecute their claim in the *Spanish* prize court, "in such manner as he should think advisable; and also to enter into any agreement or compromise with the captors, for giving up part of the cargo of the ship upon the restitution of the remainder, and to pay any sum, or appropriate part of the cargo to obtain restitution of the ship; and upon obtaining such restitution of the ship and cargo, to defray all costs and charges, and *also to forward the said ship, &c. to the port of* London, and to adjust and settle, and pay any demand on the ship and goods." How then can it be said that there was no authority from *Fisher* and Co. to insure? The order *to forward the ship to* London was an authority to insure her. She might be intercepted by the perils of the sea or of enemies, and a loss of the property would be incurred; the only way to prevent which was by insurance.

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ſurance. An authority to inſure is to be inferred from the order. *Cowan* then, acting for the benefit of all his principals, abandoned part of the cargoes to the captors, and obtained reſtitution of the reſt with the ſhips in a maſs for the common benefit of all concerned; and afterwards fitted out the ſhips, and incurred charges and expences in doing all this; for which he drew bills on the plaintiffs, who accepted and have paid them, and procured the inſurance in queſtion: and he was about to forward the *Atlantic* to *London*, when ſhe was again captured by a *French* force which entered *Corunna*: the aſſured therefore upon this policy are entitled to recover from the underwriters if they had an inſurable intereſt in the ſhip. The queſtion then is who had ſuch an intereſt? I anſwer the original proprietors of both ſhips and cargoes, whoſe intereſts had been united in hotchpot through the medium of their common agent *Cowan*. *Cowan* himſelf had an intereſt in the whole: and the plaintiffs had alſo an intereſt in reſpect of the bills which they had accepted and paid for *Cowan* on account of this conjoint property. The whole was thrown into hotchpot when it was delivered up to *Cowan* by the firſt captors, and therefore the plaintiffs, who were the original owners of the ſhip *Roſs*, became intereſted in the whole. They were alſo intereſted in it as the conſignees and repreſentatives of *Cowan*, who had expended money upon the whole in hotchpot, and for whom they had accepted and paid bills on that account. It cannot therefore be ſaid that the plaintiffs had not an inſurable intereſt in the ſubject-matter. But then it is objected, that a total loſs having been paid by the underwriters upon the firſt policy on the ſhip *Atlantic*, they had thereby purchaſed an intereſt in the ſubject-matter. And they have purchaſed an intereſt in it, ſo as to entitle them-

themſelves to be conſidered in a court of equity: but ſtill the queſtion is, whether the body of the property in this ſhip was not remaining veſted in the original owners, whom the plaintiffs repreſent, ſo as to entitle them to inſure and recover as for a total loſs upon this policy; although they may be amenable over to this very underwriter for a proportion of the money when recovered. He is indeed almoſt virtually eſtopped here from contending that the property is in himſelf, when he has inſured it as belonging to others. But here the plaintiffs, by their re-purchaſe from the captors, cloathed themſelves with their original right, and the whole of the captured property having, upon the reſtitution of it, been thrown into hotchpot, the plaintiffs have an inſurable intereſt in this ſhip as upon a hotchpot right, and alſo as repreſenting *Cowan*, the common agent of all concerned. This defendant would not be entitled even in equity to retain his whole ſubſcription upon the preſent policy; for at any rate he would be liable to account for a proportion of it to the firſt ſet of underwriters.

The other judges concurred, and the poſtea was ordered to be delivered to the plaintiffs.

1811.

Monday, Nov. 18th.

SUMMERVIL *against* ISABELLA WATKINS and Others.

A bankrupt, who has been waived (or outlawed) and her person arrested and goods taken by the sheriff, under a writ of capias utlagatam, is not entitled to be relieved on summary motion from such arrest and levy, except upon the terms of appearing to the action and putting in and perfecting special bail; although the plaintiff had also proved her debt under the commission, and received a dividend; after which this action was commenced for the balance.

A Commission of bankrupt issued against the defendants, who were milliners, in March 1807, and the plaintiff proved her debt under it, and received a dividend of 3*s*. 6*d*. in the pound, which was declared in *November* 1808; notwithstanding which the plaintiff, in *June* 1810, brought her action, by original, for the balance against the defendants, and obtained judgment of waiver against them in *November* 1810; and in *October* 1811 the defendant *Watkins* was arrested, and her goods taken under a special writ of capias utlagatam, after she had obtained her certificate in the *June* preceding her arrest and the levy. Whereupon *Gurney*, on a former day in the term, obtained a rule calling on the plaintiff to shew cause why the defendant *Watkins*' goods, levied on by the sheriff under the capias utlagatam, should not be restored, and the bail-bond given by her to the sheriff on her arrest given up to be cancelled. This was now opposed by *the Attorney General* and *Comyn*, who said that the defendant, *Watkins*, being an outlaw, had no right to make this application, except upon the usual terms of appearing and putting in and perfecting special bail, according to *French* v. *Moore*, *M*. 45 *Geo*. 3. (*a*). *Gurney* relied on the election of the plaintiff to proceed under the commission. But

(*a*) 1 *Tidd*, 140. edit. of 1808.

Lord

Lord ELLENBOROUGH C. J. ſaid that the Court could not help the defendant till ſhe had obtained a locus ſtandi in judicio.

Per Curiam, Rule diſcharged with coſts.

CRESWELL *againſt* GREEN.

Monday, Nov. 18th.

An intervening *Sunday* is to be reckoned as one of the 8 days in full term given to bail to render their principal after the return of the writ.

A Rule was obtained upon the plaintiff to ſhew cauſe why an exoneretur ſhould not be entered upon the bail-piece taken in this cauſe; upon the ground that the bail were in time to render their principal on the firſt day of this term, on which day the render was made. This turned upon the queſtion whether in reckoning the eight *entire* days, which are allowed by the rule of court of *Trin.* 1 *Ann.* (*a*) for the bail to render their principal, after the return of the writ againſt them, an intermediate *Sunday* was to be counted. The writ was returnable on *Tueſday* the 25th *June;* and if the *Sunday* were to be reckoned, the eight days expired on *Wedneſday* the 3d of *July,* the laſt day of *Trinity* term: if it were not to be reckoned, then, according to the practice, the laſt day of the term being only the ſeventh in the reckoning, the bail had till the firſt day of the preſent term to make the render, which by the rule muſt be made in full term. *The Attorney General* and *Abbott,* who oppoſed the rule, inſiſted that the practice was to count the intermediate *Sunday* as one of the eight days; and cited *Wilkinſon* v. *Vaſs* (*b*) in confirmation of it, where there muſt have been an intervening *Sunday* reckoned.

(*a*) Vide *Cooke's R.* & *O.* in *K. B.*

(*b*) 8 *Term Rep.* 422.

F. Pollock

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CRESWELL *against* GARROW.

F. Pollock contrà, said that there was no adjudged case upon the point sanctioning the practice, and therefore it was still open to the Court to decide it upon principle and convenience. That the true spirit of the rule of *T.* 1 *Ann.* was to give the bail eight *surrendering* days, which they would not have, if *Sunday* were included, though an intermediate day. And this would best accord with a late decision of this Court in *Wathen* v. *Baumont* (*a*) that an intervening *Sunday* is not to be reckoned on a four day rule for bail in scire facias to appear and plead in term. And though in *Roberts* v. *Quickenden* (*b*), there cited, the rule is said to be otherwise in actions in general; yet in *Miller* v. *Petit* (*c*), which was before the rule of Court of *T.* 1 *Ann.* the Court held that the bail should have the same time for the render of the principal in debt upon their recognizance as if they had been sued in scire facias.

Lord ELLENBOROUGH C. J. Whatever the general rule may be, the grammatical construction of the rule of Court of *Trin.* 1 *Ann.* accords with the practice which has prevailed, as we are informed by the master, of reckoning the *Sunday*, when intervening, as one of the eight days given to the bail to render their principal. The words are that they shall have liberty to render the defendant "by the space of eight entire days in full "term next after the return of the writ, &c.:" and *Sunday* is as much a day to occupy space of time as any other day. The practice being settled ought not to be varied. The other judges concurred; and *Bayley* J.

(*a*) *E.* 49 *G.* 3. 11 *East*, 271. explained by *Roberts* v. *Quickenden*.
(*b*) *ib.* 272.
(c) *H.* 15 *W.* 3. 1 *Ld. Ray.* 720.

added that if the proceedings had been by original, the bail would have had till the quarto die post of the return of the second scire facias (*a*) to render their principal; which day would not be altered by the intervention of a *Sunday*.

Rule discharged.

(*a*) Vide 1 *Tidd.* 237. edit. of 1808.

MAYO and Another *against* ROGERS and Another, Bail of CRACKLOW.

Tuesday, Nov. 19th.

In declaring in scire facias on a recognizance of bail, taken in an action by original, there is no incongruity in stating that the recognizance was taken in an action "then "lately *commenced* and "depending *in* "*B. R*;" for the action may be said to *commence* in this court when its jurisdiction attaches upon the original writ sued out of Chancery.

IN scire facias on the recognizance of bail the declaration set out the recognizance taken in *B. R.* in *Tr.* 50 *Geo.* 3. wherein the defendants, pledges and manucaptors of *C. T. Cracklow*, acknowledged themselves to owe to the plaintiffs the sum of 200*l.*, and that the same should be levied upon each of their lands and chattels for the use of the plaintiffs, in case *Cracklow* should be convicted in a certain plea of trespass on the case upon promises, to the damage to the plaintiffs of 133*l.*, "then lately *commenced* and depending *in the same Court*" at the suit of the plaintiffs against *Cracklow*, and if *Cracklow* should not satisfy to the plaintiffs the damages adjudged to them, or render himself, &c. prout patet, &c.: and then it stated in the usual form that though the plaintiffs in *Hil.* 51 *Geo.* 3. in *B. R.* *by our writ*, and by the judgment of the said Court, recovered in the said plea against *Cracklow* 148*l.* &c. prout patet, &c.; yet *Cracklow* had not satisfied the damages or rendered himself, &c.: and concluded by requiring the sheriff to make known to the defendants to appear in *B. R.* on a certain day, to shew why the plaintiffs should

not

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MAYO *against* ROGERS.

not have execution against them for the debt acknowledged, &c. It then stated the sheriff's return of notice to the defendants to appear, and their appearance, and the prayer of the plaintiffs for execution against them for the sum acknowledged. To this there was a special demurrer; because the recognizance is alleged to have been acknowledged in a plea of trespass on the case upon promises then lately *commenced* and depending *in the Court of K. B.*, when it appears by the declaration that the plea or action in which the judgment was recovered was commenced *by original writ* issuing out of Chancery, and not out of *K. B.*

E. Lawes was now heard shortly in support of this objection, and said that this declaration was not according to the precedents, which in actions by original only state that the recognizance was given in a cause *depending in K. B.*; and he relied on the rule laid down in *Co. Lit.* 303. *a.* and other books (*a*), that certainty to a common intent in pleading, though sufficient to excuse, was not sufficient to charge a party.

Littledale was to have supported the declaration. But

Lord ELLENBOROUGH C. J. said that there was no ground for the objection. That though this Court had only an original authority over actions commenced by bill; and that in actions by original the writ was sued out of Chancery; yet the words "then lately *commenced* and depending in *B. R.*" did not necessarily imply a con-

(*a*) *Dovaston* v. *Payne*, 2 *H. Blac.* 527. was mentioned.

tradiction

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tradiction to the commencement of the action by original; for it might have been commenced in Chancery by original writ, and been then depending in this Court. But the action may be well stated to commence in this Court, when this Court begins to have jurisdiction of it; when it is legally brought hither.

Per Curiam, Judgment for the Plaintiffs.

The KING *against* The Inhabitants of SHINFIELD.

Wednesday, Nov. 20th.

Three months after a pauper, under age, had hired himself generally to a brickmaker for a year, they entered into a written contract, unstamped and without seals, whereby the pauper covenanted and agreed to serve his master for three years, to learn to make bricks, &c. on condition of his master finding him in board, lodging, and clothes, and for him to be decently clothed at the end of the three years, on condition of his attending the kiln at nights: held that this contract, (assuming that an infant might bind himself by any contract made for his benefit at the time, if legally framed,) was no proof of an apprenticeship in the contemplation of the parties, but only of a new hiring in the same relation of master and servant as the original hiring; only restraining the service to such employ of the master as would enable the boy to learn the trade; (for the master did not bind himself to teach him the trade.) But if the intention of the parties had appeared to be to contract for an apprenticeship, yet as such contract was illegal and void in the form and manner of it, it would not have done away the original good contract of hiring and service for a year; and therefore the servant would at any rate gain a settlement by serving his master for a year.

MARTHA, the wife of *Richard Lanesbury*, a private in the Royal *Berks* Militia, was removed by an order of justices from the parish of *Saint Giles* in *Reading*, to *Shinfield*, in the county of *Berks*; which order was confirmed by the sessions, on appeal, subject to the opinion of this Court on the following case.

The pauper's husband in *June* 1806, (before his marriage) being then a minor, hired himself for a year to *James Palmer* of *Shinfield*, brickmaker, and continued from that time upwards of a year in *Palmer*'s service. On the 29th of *September* 1806 the pauper's husband, (being still a minor,) and *Palmer* signed the following agreement on unstamped paper, and not under seals,

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under which the pauper's husband served the whole three years. "A memorandum and agreement between *James Palmer* and *Richard Lanesbury*. This agreement made the 29th of *September* 1806 between *James Palmer*, brickmaker, of *Shinfield*, in the county of *Berks*, and *Richard Lanesbury* of *Sonning*, &c. I *Richard Lanesbury*, do hereby covenant and agree to serve *James Palmer* for three years, to learn to make bricks, and the art of burning, on condition of the said *James Palmer*'s finding me the said *Richard Lanesbury* sufficient victuals, drink, lodging and clothes, and to be decently clothed in the habit of a working man at the expiration of the three years, on condition of my helping to attend the kiln on nights. Whereas I have hereunto set my hand this 29th of *September* 1806. (Signed) "*Richard Lanesbury*," and attested by two witnesses. And in the margin of the paper, near the attestation, was written, "I *James Palmer* consenting to the above agreement." The appellants produced *Richard Lanesbury*'s mother, who swore that *Palmer* came to her, and asked her if she had any objection to her son being apprenticed to him; and she said "no."

Abbott and *Cooper*, in support of the orders, admitting, first, that if the original parol agreement by *Lanesbury* to serve *Palmer* as a servant for a year were meant to be abandoned, and another contract for service as an apprentice substituted in the place of it by the written agreement entered into between them in three months after the commencement of the service, no settlement was gained by *Lanesbury* in *Shinfield*: they denied that such was the intention of the parties, or the operation of the written contract. For where one is retained to serve another generally, and not as an apprentice, eo nomine; though it be part of the contract

that

that he is to be taught a trade; it only operates as a contract of hiring and service, and not of apprenticeship. This was decided in *Rex* v. *Hitcham* (*a*) and *Rex* v. *Little Bolton* (*b*), and is now the established rule (*c*). The conversation between *Lanesbury*'s mother and *Palmer* cannot vary the written contract. In *Rex* v. *Highnam* (*d*), it was expressly stated that the parties meant to constitute an apprenticeship; which prevented the gaining of a settlement as a hired servant. In this view of the case it is immaterial whether the written contract were valid or not: if valid, a settlement was gained as a hired servant under it: if invalid, as not being stamped, then the pauper continued to serve in *Shinfield* for more than a year under the original contract as a yearly servant, and gained his settlement there. But supposing the written contract would in its terms constitute an apprenticeship; then, not being stamped, it could not be received in evidence, to do away the former good agreement by parol.

Burrough, *Wakefield*, and *Burnal*, contrà. Though the instrument of the 29th of *September* 1806 were invalid, as an apprenticeship; yet if in fact *Lanesbury* intended to serve, and did serve, his master from that time in the supposed character of an apprentice, that put an end to the relation of master and servant; so that there was no service for a year under the first contract. The question therefore turns upon the true construction of the written contract, whether the parties intended by the terms of it to create a hiring or an apprenticeship. The distinctive character of the latter, in addition to the service of the master, which is common to both, is for the master to teach the person re-

(*a*) *Burr. S. C.* 489. (*b*) *Cald.* 367.
(*c*) Vide *Rex* v. *Rainham*, 1 *East*, 531. and *Rex* v. *Eccleston*, 2 *East*, 298.
(*d*) *Cald.* 491.

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tained ſome trade or buſineſs; and that was ſtipulated for by the contract in queſtion: no technical words can be neceſſary to create ſuch a contract. The caſe of the *King* v. *Little Bolton*, where that notion prevailed, was afterwards overruled in the *King* v. *Highnam* (*a*), where an apprenticeſhip was eſtabliſhed without a retainer eo nomine in the contract. So it was in *Rex* v. *Laindon* (*b*), and *Rex* v. *Rainham* (*c*), which followed. [*Le Blanc* J. In *R.* v. *Laindon* a premium was given to the maſter; which was relied on as ſhewing the intention of the contracting parties to create an apprenticeſhip.] The reſerving a premium is no neceſſary part of ſuch a contract; and the circumſtance that no wages are to be paid equally indicates the ſame intention in this caſe: for if a mere hiring and ſervice were meant, as under the firſt general contract, though no particular ſum was mentioned at the time, the mere relation of maſter and ſervant would have entitled the ſervant to wages upon a quantum meruit; which would not reſult from a mere contract of apprenticeſhip. [*Bayley* J. The boy was to have clothes provided for him as well as board and lodging, and he was to be ſo employed as to enable him to learn the trade: there was therefore an equivalent for wages. Lord *Ellenborough* C. J. There are no terms in this contract by which the maſter binds himſelf to teach the boy his trade: the boy is to have the opportunity of learning it by ſerving the maſter in his trade for three years; but it does not therefore follow that an action would lie againſt the maſter for not teaching him.] In the *Laindon* caſe the maſter did not undertake to teach the party ſerving; and yet the Court thought that an apprenticeſhip was intended, though

(*a*) *Cald.* 491. (*b*) 8 *Term Rep.* 379. (*c*) 1 *Eaſt*, 531.

defectively

defectively made. In *Rex* v. *Little Bolton* (*a*), and *Rex* v. *Eccleston* (*b*), there was a reservation of wages, which rather shewed an intention to create a hiring and service: and in the latter case Lord *Ellenborough* gave only a reluctant assent to the former decision.

Lord ELLENBOROUGH C. J. This was the case of a person, who, though a minor, had power to contract for a hiring and service to another, or as an apprentice, according to the principle laid down in the case of *Drury* v. *Drury*, cited in 3 *Term Rep.* 161. that if an agreement be for the benefit of an infant at the time, it shall bind him: and that has not been drawn into controversy upon this occasion; but it is admitted that if the case had stood upon a contract of hiring alone, it would have been good and binding to enable him to acquire a settlement in *Shinfield* by a service under it. The only argument has been upon the effect of the real or supposed apprenticeship created by the instrument, which it is said put an end to the service under the original contract. But, quâcunque viâ datâ, he gained a settlement in *Shinfield*: for if the instrument were invalid as being a fraud upon the law, it is clear that there was no good apprenticeship created, because it was not created in the manner prescribed by the law: and if invalid, and not receivable in evidence, what is there to do away the former contract of hiring for a year? But supposing it to be valid, and not operating as an apprenticeship, but as a hiring in the relation of master and servant; what is this but the case of a continuing service operating under a new contract of hiring, merely superadding other terms, whereby the servant was to have food and clothing

(*a*) *Cald.* 367. (*b*) 2 *East*, 298.

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provided for him in the manner ſtated, and an opportunity of learning the trade of his maſter, inſtead of ſeeking for a compenſation for his ſervice upon a quantum meruit. It is therefore unneceſſary to determine whether or not this was a good contract of hiring and ſervice, as created by the written inſtrument. And all the caſes cited by the appellant's counſel differ from the preſent, becauſe in none of them was there a good contract of hiring and ſervice independent of the imperfect contract of apprenticeſhip in diſpute. But here there was an original perfect contract of hiring and ſervice, which was not defeated by an invalid inſtrument. With reſpect however to the caſe of the *King* v. *Little Bolton*, the Court in the caſe of the *King* v. *Eccleſton* conſidered it as a ſubſiſting authority, whatever queſtion there might have been upon the ſubject at firſt; and I think the convenience of the thing is in ſupport of it: but it is not neceſſary now to diſcuſs that point.

Grose J.* Here there was originally a good contract of hiring and ſervice; and that was not done away with by the ſubſequent inſtrument, whereby the parties merely prolonged the duration of the contract, and fixed the compenſation to be made by the maſter for the ſervice.

Le Blanc J. To give a ſettlement by hiring and ſervice there muſt be a contract of hiring for a year; and this caſe is diſtinguiſhable from all the former caſes, in which the queſtion has been whether the contract was to ſerve as an apprentice, or as a hired ſervant, where if the Court conſidered that the contract was to ſerve as an

8 apprentice,

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apprentice, it could not enure to give a settlement as in case of a hired servant; for in none of those cases was there any valid contract of hiring and service existing before independent of the instrument in question. But here the husband of the pauper had first entered into a good contract by parol as a hired servant for a year; and pending that contract he and his master entered into a written agreement; by which it is contended that the parties meant to contract for an apprenticeship; and that this, though invalid for the purpose of creating an apprenticeship, yet changed the nature of the service under the former hiring into a service as an apprentice, and therefore prevented the gaining of a settlement as a hired servant. But I do not accede to that argument; because if there were at one time a subsisting valid contract of hiring and service for a year, and, pending that, the parties enter into an invalid agreement, I do not see how that can do away the former valid contract. But even upon the construction of the written instrument itself, I do not think that it is to be taken as a contract of apprenticeship. In all the former cases, where the instrument in question has been so construed, it has been stated that the parties intended to contract in the relation of master and apprentice, only they had contracted informally in order to avoid the stamp duties. But here the contract is for *Lanesbury* to serve *Palmer* for three years to learn the art of a brickmaker, on condition of *Palmer*'s finding him in board, lodging, and clothes: there is no contract by the master to teach him, but only for the boy to have the opportunity of learning the business. It is said that no wages are reserved; but that is no more than what often happens with boys at service: they get less at first, be-

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caufe they muft firft learn their bufinefs before they can be of ufe to their mafters in it. Then, though it is ftated here that the boy was to ferve his mafter to learn his bufinefs, that would not prevent it from operating as a contract of hiring and fervice. I do not think therefore that this was in the terms of it an agreement for an apprenticefhip, fo as to fuperfede the former contract of hiring and fervice. But even if it were intended as an apprenticefhip, yet the inftrument, being invalid, would not fuperfede the former valid contract.

Bayley J. I confider the inftrument as a contract of fervice, and not as an apprenticefhip. There was an original good contract for a year between the parties as mafter and fervant generally, and after three months fervice under it, they entered into a new agreement, by which the boy was to ferve his mafter for three years, not generally, but to learn to make bricks and the art of burning, upon condition of being found in board, lodging, and clothes. The meaning of the parties therefore was that the general fervice before contracted for fhould be reftrained to fuch fervice as would enable the boy to learn his mafter's bufinefs. If an apprenticefhip had been intended, there would have been words introduced into the agreement binding the mafter to teach the boy; and there being no fuch words of obligation on the mafter, and the written contract not having the ordinary words of binding to ferve as an apprentice, and the intent of the parties, as collected from the terms of it, being at leaft equivocal; we are warranted by the cafes in faying that the object of it was merely to confine the general fervice before contracted for to fuch parts of the mafter's em-

ploy as would enable the boy to learn his business. If this therefore were to give an extraordinary benefit to the servant, the master might well stipulate for receiving such service without the payment of wages.

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Orders confirmed.

The KING *against* PARRY.
The Same *against* PHILLIPS.

Wednesday, Nov. 20th.

One who has not taken the sacrament according to the rites of the church of *England*, within a year before his election in fact to a corporate office, is disqualified by the corporation act, 13 *Car* 2. *st.* 2. *c.* 1. *s.* 12. from being elected: and if such disqualification be notified to the electors at the time of election, votes afterwards given to such person are then thrown away; and any candidate having the most legal votes, though in fact inferior in number to the first, is duly elected and entitled to be sworn in; but until he be sworn in, the office is not *legally filled up and enjoyed by him*, within the exception in the annual indemnity act. And therefore if the disqualified person who had the greatest number of votes be sworn into the office, and afterwards qualify himself by taking the sacrament, &c. within the time allowed by the indemnity act, he is thereby recapacitated and freed from all disability, and his title to the office thereby protected; such office not having been then already vacated by judgment, or *legally filled up and enjoyed* by another person.

AN information in the nature of quo warranto was exhibited against the defendant *Parry*, (and the like proceeding was had against *Phillips*), calling upon him to shew by what authority he claimed to be a common councilman of the town and county of the town of *Haverford West*; which office he was charged with having exercised from the 6th of *March*, 50 *Geo.* 3. to the time of exhibiting the information, without any legal warrant. To which he pleaded, that *Haverford West* is an ancient town and county, incorporated by the name of the mayor, sheriff, bailiffs, and burgesses of the county of *Haverford West*: that there ought to be 24 common councilmen distinct from the other burgesses; and that the office of common councilman is an office of great trust, &c. That by the charter of the 7 *James* 1. confirming their old and granting new privileges, &c. to the corporation, the King granted that there should be a mayor, and 24 select burgesses, of whom 15 should be aldermen, and

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the reſt brethren, to be of the common council to aſſiſt the mayor, &c.: and further, that upon the death or removal from office of any of the common council, &c. it ſhould be lawful for the mayor and 24 of the common council, or the major part of them, and the reſt of the burgeſſes, or the major part of them for the time being, to aſſemble in the *Guildhall*, and there to elect one or more others into the vacant place or places; and that he or they ſo elected, having taken the oath of office before the mayor, &c. ſhould be of the ſaid 24 of the common council in the place or places of him or them ſo dying or removed, &c. That this charter was accepted, and that the corporation have ever ſince conformed to it. The plea then ſtated that on the 27th of *February* 1810 the place of one of the 24 of the common council became vacant, and on the 5th of *March* following the mayor and the major part of the common council and the burgeſſes duly aſſembled in the *Guildhall* to elect one of the burgeſſes into the vacant place, and then and there duly elected the defendant *Parry*, then one of the burgeſſes, into the vacant place of one of the common council; that the defendant had afterwards due notice of ſuch his election, and before he took upon him to execute the office was ſworn in before the mayor, &c., and by virtue thereof was admitted into and took upon himſelf the ſaid office: and ſo he claimed to exerciſe the ſame of right.

The proſecutor replied, that the ſuppoſed election of the defendant was made after the expiration of the commiſſions mentioned in the ſtat. 13 *Car.* 2. (ſt. 2. c. 1. ſ. 12. the corporation act;) *and that the defendant had not* within a year next before his ſaid ſuppoſed election *taken the ſacrament of the Lord's Supper, according to the rights of* the

the church of England; whereby and by force of the same statute the said supposed election of the defendant was wholly void. 1811.

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The defendant rejoined, that the election and swearing in of the defendant in his plea mentioned was made and took place before the 12th of *March* 1810 (*a*); and that the

(*a*) The annual indemnity act of that year was brought into the House of Commons on the 12th of *February*, and into the Lords' House on the 20th; and having passed the Lords on the 23d of the same month, received the royal assent on the 12th of *March*. As these acts are not usually printed in the common editions of the Statutes, a copy of so much of the act in question as applies to the case is subjoined.

The annual indemnity act, which was passed on the 12th of *March* 1810, in the 50th *G.* 3. (*c* 4.) reciting (*s.* 1.) that persons who had omitted to qualify themselves agreeably to the stat. 1 *G.* 1. *st.* 2. *c.* 13. 13 *Car.* 2. *st* 2. *c.* 1. and other statutes mentioned, had incurred, or were in danger of incurring, penalties and disabilities; enacts, "that "every person who at or before the passing of this act hath or shall "have omitted to take and subscribe the said oaths and declarations, or "to receive the sacrament of the Lord's Supper, or otherwise to qualify "himself within such time, and in such manner, as in and by the said "acts or any of them, or by any other act of parliament in that behalf "made is required, and who after accepting any such office, &c., on "account of which such qualifications ought to have been had and is "required, hath taken and subscribed the said oaths, or made the de-"clarations required by law, and also received the sacrament of the "Lord's Supper according to the usage of the church of *England*, &c.; "or who, on or before the 25th of *March* 1811, receive the sacrament, "&c. in such cases wherein the said sacrament ought to have been "received, &c.; shall be and are hereby indemnified, freed, and dis-"charged from and against all penalties, forfeitures, incapacities, and "disabilities incurred or to be incurred, for or by reason of any neglect "or omission, previous to the passing of this act, or taking or sub-"scribing the said oaths, &c., or receiving the sacrament, &c. accord-"ing to the above-mentioned acts, or any of them, &c.; and such per-"son is and shall be fully and actually recapacitated and restored to the "same state and condition as he was in before such neglect or omission, "and shall be deemed and adjudged to have duly qualified himself accord-"ing to the above-mentioned acts and every of them; and that all elections "of and acts done or to be done by any such person, or by authority de-"rived from him, are and shall be of the same force and validity as the "same or any of them would have been if such person had taken the "said oaths or assurance and received the sacrament of the Lord's Supper, "&c., according to the directions of the said acts and every or any of "them; and that the qualification of such person, qualifying himself in "manner

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the defendant, after his election, and before the 12th of *March* 1810, to wit, on the 6th of the same *March*, *accepted the office* of common councilman, *and exercised and enjoyed the same* in pursuance of his said election; and that *after his said election and swearing in, and after his said acceptance of the said office, and before the exhibiting of this information* against him, to wit, on the 11th of *March* 1810, *he duly took and received the sacrament* of the Lord's Supper, according to the usage of the church of *England;* whereby and by force of the statute in such case made (i. e. the annual indemnity act) he was freed and discharged from and against all incapacities and disabilities by him incurred by reason of his neglect or omission in the replication mentioned, and was fully and actually recapacitated and restored to the same state and condition he was in before such his neglect or omission, and duly qualified himself to take, hold, and exercise the said place and office of common councilman in the information mentioned, according to law and to the act of parliament in the replication mentioned. And then the defendant averred that the said office of common coun-

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" manner and within the time appointed by this act, shall be to all intents and purposes as effectual as if such person had taken the said oaths, &c. and received the sacrament, &c. within the time and in the manner appointed by the several acts before mentioned."

Then *f.* 6. provides " that this act shall not extend or be construed to extend to restore or entitle any person to any office, &c. already actually avoided by judgment of any of his majesty's Courts of record, or *already legally filled up and enjoyed by any other person*; but that such office, &c. so avoided, or legally filled up and enjoyed, shall be and remain in and to the person [who is or shall at the passing of this act be (1)] legally entitled to the same, as if this act had never been made."

(1) The words within the brackets are not in the act of the 4 *Geo.* 3. c. 31.

cilman

cilman to which he was so elected, as in his plea is mentioned, hath not at any time after the same became vacant, as in the plea mentioned, *been legally filled up and enjoyed by any other person.*

The prosecutor surrejoined* that before and at the time of the supposed election of the defendant, there were six vacancies in the common council, and that an election was had at the time in the plea mentioned, and before the passing of the statute in the rejoinder mentioned (the annual indemnity act,) for filling up the six vacancies: that at the said election the defendant *Parry*, *J. L. Phillips* (the defendant in the other information), *W. H. Scourfield*, *J. Mathias*, *S. Harris*, *G. Roch*, *W. Fortune*, *G. Phillips*, *J. Thomas*, *T. Scowcroft*, *T. Wright*, and *Jos. Smith* were candidates; *and that the defendant* Parry, *and* J. L. Phillips, had not either of them *within a year next before the said election taken the sacrament* of the Lord's Supper according to the rights of the church of *England*: that a poll was taken on the said supposed election, *and that full and distinct notice was at the time of taking the said poll, and as soon as two electors had polled for* Parry *and* Phillips, *and before any other elector had polled*, given to the mayor who took the poll and presided at the said supposed election, and to the electors at the said election, in the presence and hearing of the defendant *Parry* and of *Phillips*, that the said *Parry* and *Phillips* had not either of them within a year next before the said election taken the sacrament of the Lord's Supper according to the rites of the church of *England*, (which the said *Parry* and *Phillips* did not either of them deny,) and that all votes given for them or either of them at the said election would be thrown away: nevertheless the mayor continued to take the poll, and to take and reckon the votes offered for *Parry* and for *Phillips*,

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Phillips, and at the close thereof declared the numbers to be as follow, viz. for *Parry* 130, for *Phillips* 133, *Scourfield* 129, *Roch* 134, *Harries* 134, *Mathias* 126, *Smith* 37, *Wright* 39, *Fortune* 34, *Scowcroft* 26, *Thomas* 32, and *G. Phillips* 26; whereupon and by reason of the premises the said *Parry* and *Phillips*, not having taken the sacrament, &c. within a year next before the said election, and notice thereof having been given as aforesaid; and the said declaration of the numbers polled for the said persons, so being such candidates, being made before the passing of the statute in the rejoinder mentioned, (the annual indemnity act) and the votes offered and counted for *Parry* and *Phillips* as aforesaid, by reason of such their incapacity and such notice thereof so given as aforesaid, being thrown away; the said *Wright* and *Smith*, by reason of the premises, were respectively and duly elected into the said offices, and were then, and at, and before the passing of the said (indemnity) act were and still are legally entitled to hold and enjoy the said offices, *and the said offices were legally filled up by them*, and they (*Wright* and *Smith*) were then and there *legally entitled to be sworn into the said offices* respectively, and then and there did *duly tender themselves* to the mayor, &c. *to be sworn in*, &c.: but the mayor, knowing the premises, but wrongfully intending to prejudice *Wright* and *Smith*, and to prevent them, who then and at the passing of the said act were legally entitled to the same as aforesaid, from having the fruit and effect of such their election, did then and there and from thence until the filing of the said information wrongfully and unlawfully neglect and refuse to swear in *Wright* and *Smith*, or either of them, into the said offices respectively, &c. The prosecutor, (having the privilege of the crown) added another similar surrejoinder, alleging

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alleging the refusal of the mayor to swear in *Wright* and *Smith* to have been *by conspiracy and combination with* Parry *and* Phillips. To these surrejoinders the defendant demurred generally.

This case was first called on for argument in *Trin.* 51 *Geo.* 3.; but after counsel had been heard a short time, the Court intimated that as the pleadings then stood, it did not sufficiently appear that the defendant had filled the office before the 12th of *March* 1810: and as, on the other hand, an objection was mentioned to the surrejoinder, in not stating at what period of the poll the notice of the defendant's incapacity was given; both parties had leave to amend, and the pleadings were framed as they are now stated. In this term

Abbott, in support of the demurrer, contended, on the part of the defendant, that having taken the sacrament before the information was filed, and within the time mentioned in the annual indemnity act, 50 *Geo.* 3. *c.* 4. he was recapacitated by that act, and the objection to his title, on account of his not having taken the sacrament within a year before his election, was thereby removed. The principal object of the legislature in their various enactments from time to time has been to secure the succession in corporations to persons conforming to the church of *England*. In the reign of *Charles* 2. (*a*) this was done by requiring the preceding test of conformity within a year before the election of the corporator. But it was afterwards considered that members of the established church might have accidentally omitted to take the sacrament within the year; and therefore as early as in the 5 *Geo.* 1. an act (*c.* 6.)

(*a*) 13 *Car.* 2. *st.* 2. *c.* 1. The corporation act.

was

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was passed "for quieting and establishing corporations," by which the legislature made good the title of all persons then in possession of corporate offices, who had omitted to comply with the test; and enacted prospectively that no person thereafter elected to any corporate office "shall be removed by the corporation, or otherwise prosecuted for or by reason of such omission; nor shall any incapacity, disability, forfeiture, or penalty be incurred by reason of the same; unless such person be so removed, or such prosecution be commenced, within six months after such person's being placed or elected into his respective office, as aforesaid; and that in case of a prosecution, the same be carried on without wilful delay." Since, then, the title of a person to a corporate office cannot be impeached unless within six months after his election, on account of such omission, the election of a person under that disability is not void, but voidable only in case of a removal or prosecution within the time limited: and so it was considered by Lord *Mansfield* in *Crawford* v. *Powell* (a). Independently, therefore, of the annual indemnity act, the defendant did not labour under an absolute, but only under a qualified, disability at the time of his election. But that act has now confirmed his title as effectually as if the disability had never existed; unless, within the words of the proviso, (*s.* 6.) the office were, at the time of the act passed, "*already legally filled* "*up and enjoyed by any other person.*" Now the rejoinder states that the defendant was sworn in and enjoyed the office, and that before the 12th of *March* he took the sacrament and qualified himself; and that the vacant office to which he had been elected had not at any time

(a) 2 *Burr.* 1013—16.

after

after ſuch vacancy *been legally filled up and enjoyed by any other perſon:* and the effect of the ſurrejoinder is that the mayor wrongfully refuſed to ſwear in *Smith* and *Wright*, and to let them enjoy the office. Until the party is ſworn into the office, it cannot be ſaid to be legally filled up and enjoyed by him; for whatever his right to be ſworn in and to enjoy it may be; yet if he take upon him to act in it before he is ſworn in, he ſubjects himſelf to a quo warranto information. The general object of the annual indemnity act is to put a ſubſequent conformity within a given time in the place of a prior conformity; with two exceptions only; the one, that his title is not impeached within a certain time; the other, that the office has not been legally filled up and enjoyed by any other perſon.

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Owen jun. contrà, contended, firſt, that the defendant was not elected into the vacant place; in which caſe there muſt be judgment of ouſter. Secondly, that the place was *legally filled up and enjoyed* by another perſon within the 6th ſection of the indemnity act, before it paſſed. Firſt, there were ſix vacancies and twelve candidates; and as ſoon as two only of the electors had voted, full notice was given to the reſt of the electors that *Parry* and *Phillips* were diſqualified by reaſon of their not having taken the ſacrament within a year before, and that all the votes for them would be thrown away. After this notice the legal election fell upon *Wright* and *Smith*, the two laſt of the ſix, excluding *Parry* and *Phillips;* and it was the duty of the mayor to have ſworn in the two former inſtead of the latter, and it was by his own wrong or in conſpiracy with others that he refuſed to do ſo, which cannot alter the rights of the parties who

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were legally elected. The indemnity act only applies to cure cases where there has been an election good in the form at least of it, but liable to be set aside from some *latent* defect in the title, unknown to the electors at the time: but here the defendant had no title to cure, and not merely a defective title: he was not in a legal sense *elected*, because the votes given for him were known at the time to be thrown away. The words of the st. 13 *Car.* 2. *st.* 2. *c.* 1. are, " that no person *shall be placed, elected, or chosen* in or to any the offices or places aforesaid that shall not have within one year next before such election or choice taken the sacrament, &c.: and in default thereof every such placing, election, and choice is enacted and declared to be void." In order to shew that votes given for a candidate known at the time to be unqualified are thrown away, and that even a minority of votes given in such a case to another candidate who is qualified will avail as an election, he cited *Regina* v. *Boscowen*, *E.* 13 *Anne*, *Rex* v. *Withers*, *E.* 8 *Geo.* 2. (*a*), and *Taylor* v. *The Mayor of Bath*, *M.* 15 *Geo.* 2. *B. R.*; all of which are cited in *The King* v. *Monday* (*b*), and recognized by Lord *Ellenborough* in *The King* v. *Hawkins* (*c*). The case of *Taylor* v. *The Mayor of Bath*, which is fullest to the point, is best reported from Mr. *Ford*'s notes (*d*) in 3 *Luders*,

(*a*) A difference was observed between the statement of this case as given in argument in *Cowp.* 537. and by Lord *Ellenborough* C J. in 10 *East*, 217.; but the latter statement agrees with the facts of the case as noted by Mr. *Ford*, in the argument of the case of *Taylor* v. *The Mayor of Bath.*

(*b*) *Cowp.* 537.   (*c*) 10 *East*, 211.

(*d*) The note states that *Taylor* moved for a mandamus to be admitted into the office of a common councilman of the corporation of *Bath.* The defendant (the mayor) returned non fuit electus. The plaintiff traversed the return: and the cause being at issue, it appeared in evidence at the trial, that by the charter the election of common councilman is to be by the

3 *Luders*, 324. Lord C. J. *Lee* there told the jury, that if they were satisfied that the electors had notice of *Bigg*'s want of qualification to find for the plaintiff; because *Bigg*, not being qualified, was to be considered as a person not in esse; and the voting for him was a mere nullity; and those who did vote for him were to be considered as virtually consenting to the election of *Taylor*. In the report in *Cowper*, it is said that when the case afterwards came before the Court, the Chief Justice compared it to the case of voting for a dead man. The same doctrine was recognized in *Oldknow* v. *Wainwright* (*a*), and in *King* v. *Hawkins* (*b*). And the case of *Harrison* v. *Evans* (*c*) in 1762, before several of the Judges, commissioners of errors assigned upon a judgment in the sheriffs' court of *London*, confirmed in the hustings court, and finally before the House of Lords in 1767, also establishes the nullity of election of one to the office of one of the sheriffs of *London*, who is disqualified in this respect. If then there were no election of the defendant by reason of his known disqualification at the time, the annual indemnity act, however strongly worded, cannot apply; for there can be no re-capacity without a previous capacity for the office. But, secondly, even if the general provision of the indemnity act applies to such a case, yet this

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the mayor, recorder, and aldermen, or the major part of them then present: and that the mayor and 27 aldermen being assembled for this purpose, *Taylor*, *Bigg*, and *Kingston*, were proposed as candidates; but *Bigg* being neither an inhabitant, nor a freeman, as the charter requires, was objected to as a disqualified person: notwithstanding which *Bigg* had 14 votes, *Taylor* 13, and *Kingston* only 1. But *Bigg* not being a person qualified, *Lord C. J. Lee*, before whom the cause was tried, directed the jury, &c. (as above), and *Page*, *Chapple*, and *Wright*, Justices, afterwards confirmed that direction in Bank, upon a motion for a new trial. MS. *Ford*.

(*a*) 2 *Burr*. 1017. (*b*) 10 *East*, 211. (*c*) *Cowp*. 393. n.

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falls within the exception of the 6th section; for the office was *legally filled up and enjoyed* by *Wright*, who was legally entitled to the same. The wording of the two exceptions are remarkable: the act is not to extend to entitle any person to an office which is already "*actually* avoided by judgment," &c. or already "*legally* filled up and enjoyed" by another: the avoidance by judgment, therefore, must be *actual*; but a *legal* filling up and enjoyment of the office by another is sufficient, in order to exclude the party from the benefit of the indemnity. This case is indeed distinguishable from that of *The King* v. *Hawkins*, inasmuch as there the other candidate was sworn into the office before two of the aldermen, as he lawfully might, the mayor having before refused to administer the oath; but here there being no such provision in the charter, no neglect is imputable to *Wright*, who did all that in him lay to perfect his title by tendering himself to the mayor to be sworn in, who refused to swear him in, by wrong and conspiracy, as it is alleged, with the defendant *Parry* and with *Phillips*: the consequences would be mischievous if this fraud were allowed to avail. [Lord *Ellenborough* C. J. The mayor's refusal to swear in *Wright* and *Smith* will not, I fear, give them a title to the offices, if the act does not give it to them. And how can we say that these offices were legally filled up and enjoyed by them, when in fact they were not so, whatever title they might have had to be permitted to fill and enjoy them. Can there be a conspiracy to deprive a person of an enjoyment which never existed. Supposing the defendant's election to the office to have been invalid at the time, that would not make the office to be filled up and enjoyed by another.] If such a conspiracy can avail, the corporation act will be defeated.

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Abbott, in reply, as to the first question, said that it could not be denied that there was an election in fact of the defendant by the majority of votes, though it might be argued that it was not an election of him de jure, by reason of his declared incapacity at the time: and as to that, he contended that the defendant was capable of being elected, because the annual indemnity act puts a subsequent in the place of a prior conformity to all intents and purposes, as effectually as if the party had qualified himself before, except in the two events mentioned. Then, 2dly, the office was not *legally* filled up and enjoyed by any other; for no person can be said to be *legally* in an office until he has taken the oaths.

Lord ELLENBOROUGH C. J. There can be no legal enjoyment of an office, unless there be an enjoyment of it de facto. In *The King* v. *Hawkins* the office had been actually filled up by another person who had been sworn in: in that case therefore every thing had been done which is required by the annual indemnity act to perfect the title and do away the incapacity of the person who had in fact the greater number of votes. If I could conceive a doubt upon this question, I would defer giving my opinion upon it at present; but I cannot think that any doubt exists. Looking to the statute of the 13 *Car.* 2. alone, I cannot but think that the defendant was incapable of being elected to the office in point of law so long as his incapacity subsisted in full effect: and after notice of that incapacity given to the electors at the time, another candidate, against whom no such objection lay, might have been legally elected to the office, though by an inferior number of votes; and if he were clothed with the possession and enjoyment of it in time, his title could not

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afterwards be questioned. But here no other candidate was clothed with the possession and enjoyment of the office before the passing of the indemnity act: and then that act intervenes, which qualifies the person elected and conforming within the time mentioned, unless the office was already actually avoided by judgment, &c. or already legally filled up and enjoyed by any other person, and frees him from all incapacities and disabilities by reason of his neglect or omission to take the sacrament previous to the passing of the act, and declares him fully and actually recapacitated and restored to the same state and condition as he was in before such neglect or omission; "and that the qualification of such person qualifying himself in manner and within the time appointed by this act shall be to all intents and purposes as effectual as if such person had taken the said oaths, &c. and received the sacrament, &c. within the time and in the manner appointed by the several acts before mentioned." The indemnity act therefore has a retrospective operation, and makes good all that was before done towards the election of the party conforming afterwards as required, unless in the mean time the office shall have been avoided by judgment, (and here there was no such avoidance,) or shall have been legally filled up and enjoyed by any other person; (and here no other person has filled up and enjoyed it.) If in the mean time the office had been filled up and enjoyed by another, the door would have been shut against this defendant; but that not having been done, the indemnity act makes his election good, as if the act of the 13 *Car.* 2. had never passed, and therefore cures all defects in his election in this respect. Whether or not this consequence overleaps the purpose of the legislature in framing the indemnity act, it is not for me to say

fitting here : I muft prefume that it is according to their purpofe, as it is within the words they have ufed.

GROSE J. The legiflature feem to me to have meant by the general provifion of the indemnity act to invite perfons elected to offices to qualify themfelves, according to the rites of the church of *England*, though they had not done fo before, and to reward them for fo doing by putting them in the fame fituation as if they had been qualified before their election; unlefs the office was already avoided by judgment, or filled up and enjoyed by fome other perfon. This defendant therefore, having conformed and qualified himfelf within the time allowed, cannot now be oufted, unlefs the other candidate was in the mean time eftablifhed in the office; which he was not, having never been fworn in: the defendant's title therefore has been perfected.

LE BLANC J. Under the ftatute of the 13 *Car.* 2. the difqualification of a perfon to be elected into a corporate office, who fhall not within one year before his election have taken the facrament, &c. is eftablifhed, whether made known or not to the electors at the time of fuch election; with this difference, that if fuch difqualification were made known to the electors before the election, their votes given in favour of fuch difqualified perfon would then be thrown away, and the candidate who had the next greateft number of votes, being good votes, would be entitled to fill and enjoy the office. Then comes the indemnity act, which, confidering the perfon in fact elected as difqualified, enacts, that if he fhall have qualified himfelf afterwards within the time allowed, he fhall be confidered as if he had been qualified at the

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time, provided the office ſhall not have been already avoided by judgment, or filled up and enjoyed by another perſon. Now here this defendant had originally a defect of title to the office in queſtion, by reaſon of his not having taken the ſacrament according to the rites of the church within a year before his election; but ſubſequently that defect has been removed by the operation of the indemnity act: for though in conſequence of the notice of the defendant's incapacity at the time of his election, the votes given for him after ſuch notice were then thrown away, and the other candidates, againſt whom there was no ſuch objection, were duly elected; yet as their title was not completed by ſwearing in, the proviſo which would otherwiſe have ſaved their right does not apply; and therefore the defendant's caſe not falling within either of the exceptions in the ſtatute, his title to the office is made good by the operation of the general clauſe.

Bayley J. ſaid he could add nothing to the reaſons given by the reſt of the Court, in which he concurred.

Judgment for the Defendant.

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TOWNEND and Another *against* DOWNING.

Friday, Nov. 22d.

In an action by the obligees of a joint and several bond against one of the obligors, who was surety for another of them who had become bankrupt, which action was brought after the plaintiffs had elected to prove their debt under the commission, and thereby had relinquished their action against the bankrupt by *f.* 14. of the stat. 49 *G.* 3. *c.* 121.; the bankrupt not having obtained his certificate, and therefore still liable to be sued by the defendant, his surety, in case of a verdict against him by the plaintiffs, is not a competent witness for the defendant, to prove that a payment of a sum equal to the penalty of the bond made by him (the bankrupt) to the plaintiffs before the action brought was made in discharge of the bond, and not upon any other account.

THE defendant was sued on a joint and several bond executed by him and by *George Berry*, and *Matthew Berry*, in the penal sum of 1000*l.*, with a condition, after reciting that *George Berry* had opened an account with the plaintiffs as his bankers; that *George Berry*, *Matthew Berry*, and the defendant should pay to the plaintiffs all such sums as they should advance to *George Berry* on the banking account, and should indemnify the plaintiffs against all such advances: but with a proviso that *Matthew Berry* and the defendant, who were sureties for *George Berry*, should only be liable to the extent of 500*l.* The defendant pleaded, 1st, non est factum; 2dly, that *George Berry*, the principal, paid to the plaintiffs the 1000*l.* demanded; and 3dly, performance of the condition; on which issues were joined. *George Berry*, after the making of the bond, and before the commencement of the action, became a bankrupt; being at the time of his bankruptcy indebted to the plaintiffs in a sum exceeding 1000*l.*, for money by them advanced to him on the banking account. The cause was tried before *Thomson* B. at *York*; and at the trial the defendant called the principal, *George Berry*, one of the obligors of the bond, as a witness to prove that a sum of 1000*l.*, which he had paid to the plaintiffs, had been expressly paid by him in discharge of the bond. It appeared that *George Berry* had not obtained his certificate, and that the plaintiffs had proved their debt under his commission. The defendant did not release *George Berry*; and therefore the plaintiffs objected that *George Berry* was not a competent witness for the defendant; being, as they alleged, interested in the defendant's obtaining

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taining a verdict. And the learned Judge, being of the fame opinion, rejected him. The jury then found a verdict for the plaintiffs, fubject to the opinion of the Court upon the point, whether *George Berry* was a competent witnefs for the defendant, to prove the above fact. If he were not, the prefent verdict was to ftand; if he were a competent witnefs, then a new trial was to be granted.

Richardfon, for the plaintiffs, faid that the queftion turned on the effect of the ftat. 49 *Geo.* 3. *c.* 121. *f.* 14. Before that act, the witnefs, not having obtained his certificate, would have been liable to an action either by his actual or by his eventual creditor; either by the bankers to whom he was originally bound, or by the defendant, his furety, if he were obliged to pay the debt; but by that fection of the act, the plaintiffs, having proved their debt under the commiffion, are deemed to have elected their remedy, and cannot proceed againft the bankrupt perfonally. But the defendant has not yet made his election, and in the event of his being obliged to pay the principal's debt to the plaintiffs, he may either prove under the commiffion, (under *f.* 8.,) or fue the uncertificated bankrupt for the amount; who will be liable alfo to indemnify the defendant for the cofts of this action, if the plaintiffs fhould recover. The witnefs therefore was properly rejected, as having an intereft to exonerate the defendant.

Littledale, contrà. Before the ftatute, if the bankrupt in this cafe had not obtained his certificate, he would have been an indifferent witnefs, as he would have been liable to one or other of thefe parties, to the extent of the fum in difpute, in either event of this caufe; and he could only have become interefted in favour of the furety by having obtained his certificate, which

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which is the reverſe of what is now contended for by the plaintiffs ſince the ſtatute [Lord *Ellenborough* C. J. Would he not always have had an intereſt in favour of his ſurety, who was ſued, to the extent of the coſts of the action ?] In *Ilderton* v. *Atkinſon* (*a*), coſts were not conſidered as varying the queſtion, where the witneſs was liable to an action, in either event of the cauſe. [*Le Blanc* J. ſaid there was a late cauſe in C. B. where that matter had been queſtioned: and Lord *Ellenborough* C. J. aſked why there ſhould not be an intereſt in coſts as well as on any other account ?] The queſtion of coſts is always conſidered merely as conſequential to the action, and not as a diſtinct intereſt. Then as before the ſtatute, the uncertificated bankrupt would have ſtood indifferently between theſe parties in point of original intereſt; the creditors ought not to be permitted, by their own voluntary act in proving their debt under the commiſſion, to give themſelves an advantage againſt the ſurety by excluding the teſtimony of the principal in which ſuch ſurety had an intereſt.

LE BLANC J. The law has armed the original creditors with the power of varying the intereſt of the debtor, as between them and the ſurety: which is an anſwer to that objection.

Lord ELLENBOROUGH C. J. Since the paſſing of the late act, the intereſt of the bankrupt under the circumſtances of this caſe has been altered; and as at the trial he had an intereſt in defeating the action, the objection made by the plaintiff to his competency was well ſuſtained.

The Court ordered the verdict to ſtand.

(*a*) 7 *Term Rep.* 480.

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Saturday, Nov. 23d.

WEEKS *against* MAILLARDET.

Where by articles under seal the defendant bound himself under a penalty to deliver to the plaintiff, by a certain day, "the whole of his mechanical pieces, *as per schedule annexed*;" the schedule forms part of the deed, which, without it, would be insensible; and therefore in covenant for the breach of the contract in not delivering the pieces; in which the plaintiff, after setting out the articles executed by the defendant, averred that to the said articles there was *then and there annexed* and subscribed a certain schedule of the said several pieces of mechanism agreed to be delivered, &c.; upon *non est factum* pleaded, it is competent to the defendant to shew in his defence, that at the time of the execution of the articles *the schedule was not annexed*, but that in fact it was afterwards subscribed and annexed by the witness to the articles, who was the agent of both parties, immediately after the execution of the articles, and after one of the parties had left the room: though the pieces mentioned in the schedule so annexed were such as had been agreed upon by the parties before the execution of the articles.

BY an agreement under the hands and seals of these parties, dated *London* the 27th *December* 1809, the defendant "engaged to deliver up to the plaintiff, on or before the 15th of *July* 1810, the whole of his mechanical pieces, *as per schedule annexed;* all the machineries performing and in good order as when first finis[hed] &c.; and further to shew to the plaintiff every t[hing] that he might want to know for exhibiting and making the said pieces perform. And on the day the defendant delivers *the above pieces as herein mentioned*, the plaintiff is to pay the defendant 1000*l.* in money, and 2000*l.* in his notes," &c. (at certain dates). "And it is further agreed that upon either party not complying with the present agreement, the defaulter shall pay to the other party, as a penalty, 1000*l.* except in case of fire, &c. And it is further agreed, that in case of any misunderstanding between the parties, it is to be settled by arbitrators chosen by themselves in the usual way." This was witnessed at the time of the execution by *Gedeon Patron.* There was also a schedule bearing the same date, and witnessed by the same person, (but not signed by the parties themselves,) which ran in these terms; "Schedule of the several pieces of mechanism, which accordin[g to] the present agreement Mr. *T. Weeks* is to receive f[rom] Mr. *H. Maillardet*," &c.; and then followed the description of the several pieces.

The

The plaintiff declared in covenant for the breach of the above-ftated agreement, which was fet out in the declaration; and then followed this averment — "And the plaintiff further faith that to the faid articles *was then and there annexed and fubfcribed a certain fchedule* of the faid feveral pieces of mechanifm, which according to the faid agreement the plaintiff was to receive from the defendant, viz.," &c., and fo it fet out the lift as contained in the fchedule. And then it affigned as a breach of the agreement, that the defendant did not deliver up to the plaintiff on or before the 15th of *July* 1810, (then paft), nor at any time fince, the whole or any part of his mechanical pieces aforefaid, but wholly neglected and refufed fo to do; whereby he became liable to pay to the plaintiff 1000*l.*, &c.

The defendant, after craving oyer of the articles, which, including alfo the fchedule, was read to him, pleaded that the faid fuppofed articles of agreement are not his deed. There was alfo another plea, not material to the prefent purpofe, that the fuppofed articles were delivered to *G. Patron* as an efcrow, upon a condition not performed; and fo they were not his deed: and another plea, that they were obtained from the defendant by fraud. Iffues were joined upon all thefe pleas: and at the trial before Lord *Ellenborough* C. J. at *Weftminfter*, all matters in difference in the caufe were referred to the arbitration of a gentleman at the bar, who ftated all thefe matters in his award, and found fpecially that on the day of the date of the articles of agreement the plaintiff and defendant met together in company with *Gedeon Patron*, whofe name appears as a fubfcribing witnefs to the articles, and who was the mutual friend or agent both of the plaintiff and defendant, and was privy

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privy to a treaty or negociation which had been going on for fome time between the parties, for the purchafe of the feveral things *mentioned in the faid fchedule*, and who was then in poffeffion of *a lift or inventory of the faid things*, and *upon which both the parties had previoufly agreed*; and that at fuch meeting *Gedeon Patron* wrote on feparate fheets of paper two parts or copies of fo much of the articles of agreement as contain the matter of agreement or covenant between the parties, beginning with the words, "*London* on this 27th of *December*," and ending with the words, "In witnefs whereof we have figned:" and thereupon each of the parties duly figned and fealed, and as his act and deed delivered, both parts or copies of the faid paper; and the defendant took up from the table and delivered into the hands of the plaintiff the part or copy upon which the plaintiff declared, and the plaintiff in like manner took up and delivered into the hands of the defendant the other part or copy; and foon afterwards the plaintiff put into the hands of *Gedeon Patron* the faid part or copy which had been fo delivered to him, and then left the room in which they had met; and *the faid Gedeon Patron, as the agent of both parties, afterwards wrote* the form of a guarantie and *alfo the faid fchedule upon both parts or copies*, and gave back to the plaintiff the part or copy that he had received from him. The arbitrator further found and awarded that each of the parties, and alfo *Gedeon Patron*, fuppofed the fubfcription of the fchedule upon the papers after fuch their fealing and delivery to be of the fame force and effect as if fuch fchedule had been written thereon before they fealed and delivered the fame; *and that the fchedule agrees in every refpect with the faid lift or inventory, and contains all the*

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the things which the parties intended to buy and sell, and no others. And then he awarded that a verdict should be entered for the plaintiff, upon all the issues joined in the cause, with 350*l.* damages; but that no execution should issue thereon until the 5th day of (the present) *Michaelmas* term; which was meant to give the defendant an opportunity of taking the opinion of the Court on the validity of the award, in point of law, upon a motion to set it aside.

This was accordingly made on a former day in the term, when it was objected by *Topping*, that the schedule was no part of the deed, having been added to it by the witness after the execution and delivery of the instrument by the parties themselves, and even after one of them had left the room; and therefore the averment, *that the schedule was then and there annexed to the deed*, was falsified by the evidence, which was properly received upon the plea of non est factum, to shew that the defendant did not execute such a deed as that which was declared upon. For which was cited *Brooke* v. *Smith* (*a*), where a memorandum indorsed on a bond restraining the condition was held on demurrer to be part of the deed, only because it was written *before* the sealing of the objection. And by *Taylor*'s case (*b*) if it be written *after* the sealing and delivery, it is no part of the condition. *Cook* v. *Remington* (*c*) is to the same effect. And *Markham* v. *Gonaston* (*d*); *Pigot*'s case (*e*), in which it was held that any material alteration of a deed after its execution, though for the benefit of the obligor,

(*a*) *Moor*, 679. and see *Burgh* v. *Preston*, 8 *Term Rep.* 486.

(*b*) *Hetl.* 136. (*c*) 6 *Mod.* 237.

(*d*) *Cro. Eliz.* 626. and vide note *a* upon this case in *French* v. *Patton*, 9 *East*, 354.

(*e*) 11 *Rep* 27.

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obligor, will avoid it; and that this may be taken advantage of on the plea of non eſt factum.

Park and *Beſt* now ſhewed cauſe againſt the rule. The body of the deed expreſsly refers to the ſchedule, "as per ſchedule annexed;" and as the ſchedule is the very copy of the liſt of articles which had been before hand agreed upon by the parties, it muſt be taken to be the ſame as if it had been in fact annexed before the execution of the articles under ſeal, and was as well authenticated by the ſignature of the witneſs who was the common agent of both parties for this purpoſe, as if it had been ſubſcribed by the parties themſelves. The reſult of the caſes is that any fraudulent alteration of a deed in a material part will avoid it; and it is not neceſſary to conteſt that point: but it is not true as to every alteration; for in *Zouch* v. *Clay* (*e*), where two executed a bond and delivered it the obligee, and afterwards, by conſent of all parties, the name of a third obligor was interlined, who alſo ſealed and delivered it; this was held not to avoid the bond as to the two firſt: and it was diſtinguiſhed from the cauſe of *Markham* v. *Gonaſton*, where the alteration was made by the conſent of the obligors only, without notice to the obligee, though to his uſe. [Lord *Ellenborough* C. J. Thoſe were caſes of internal alterations of a deed; and here the queſtion is of ſomething extrinſic which may work an alteration. But you muſt contend that "annexed" means "to be annexed."] It muſt have been obvious to the parties that the ſchedule was not in fact annexed at the time of the execution of the articles; but it was then agreed upon,

(*e*) 2 *Lev.* 35. and 1 *Ventr.* 185. and vide *Henfree* v. *Bromley*, 6 *Eaſt*, 369.

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and the true addition made immediately afterwards. [Lord *Ellenborough.* The queſtion is whether the plaintiff's allegation, that the ſchedule "was *then* and there annexed" to the articles, that is at the time when they were executed, was proved by ſhewing that it was *afterwards* annexed; upon the defect of proof of that allegation, I think I ſhould have non-ſuited the plaintiff at niſi prius.] The defendant was eſtopped by the deed, which ſtates that the ſchedule was then annexed, from ſhewing that it was not. [Lord *Ellenborough.* I cannot ſay that he was eſtopped from taking the objection, that the plaintiff did not prove his allegation in the declaration.] At leaſt it is no objection upon the plea of non eſt factum. The tranſcript of the ſchedule could not make part of the deed; nor could it be leſs the deed of the party, becauſe ſomething was added to it afterwards, which formed no part of it: it was equally the plaintiff's deed whether the ſchedule was annexed to it or not. But if advantage can be taken of it at all, it ſhould have been by pleading the ſpecial matter, as was done in *Taylor's* caſe (*a*).

Topping and *Adam* jun., contrà, relied on the caſes before mentioned on moving for the rule, in ſupport of the general point reſpecting the avoidance of deeds by any ſubſequent alteration or addition; and argued that it could make no difference whether the alteration was in the body of the deed, or by way of addition in a matter referred to by the deed, and material to its operation. And ſome of the authorities cited ſhew that this is pro-

(*a*) *Hetl.* 136. A miſtake was obſerved in that report: the word *before* is printed inſtead of *after* in p. 137. line 14.

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per evidence upon non eſt factum: in addition to which *Coſpey* v. *Turner* (*b*) is expreſsly in point.

Lord ELLENBOROUGH C. J. The queſtion is whether the objection can be taken on the plea of non eſt factum; and to determine that, it is neceſſary to decide whether the ſchedule is virtually a part of the deed. Verba relata hoc maxime operantur per referentiam ut in eis ineſſe videntur (*c*). If it be no part of, but dehors, the deed, the objection fails. What then was the intention of the parties? It was agreed that the defendant ſhould deliver up to the plaintiff by a certain day "the whole of his mechanical pieces, *as per ſchedule annexed;*" all the machineries performing and in good order; and the defendant was alſo to inſtruct the plaintiff in the manner of exhibiting and making them perform: "and on the day of the defendant's delivering *the above pieces, as therein mentioned,*" the plaintiff was to pay him a certain ſum. Without the ſchedule there was no duty to be performed by either party. The ſchedule alone deſignates the ſubject matters to be delivered up by the one party and paid for by the other. The whole deed was inoperative, unleſs the ſchedule was co-exiſting with it, and forming part of the obligation. Taken by itſelf, the deed is inſenſible, and has no object to operate upon: therefore it is not the defendant's deed without the ſchedule, which gives effect and meaning to the whole of the duties to be performed on either ſide. The articles aſſume that at the time of their execution the ſchedule was annexed; and if there were then no ſchedule, there was no deed

(*a*) *Cro. Eliz.* 800. (*c*) *Co. Lit.* 359.

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for any sensible purpose; for no duty could be demanded on the one side, or performed on the other, without the schedule. The objection therefore is well founded.

GROSE J. At the time of the execution of the articles, there was no schedule annexed to which they could apply, but it was written and annexed afterwards by the witness: therefore the deed on which the breach is assigned was not the deed of the defendant.

LE BLANC J. The difficulty arises on the form of the plea. At first I thought that the proof that the defendant had executed an instrument in the very terms as set out in the declaration for the delivery of the whole of his mechanical pieces, *as per schedule annexed*, was sufficient to maintain the declaration, upon the plea that it was not the deed of the defendant; and that the averment, that there was *then and there annexed and subscribed* a certain schedule of the said several pieces of mechanism, &c. if not true, should have been taken advantage of by a substantive plea, putting that fact in issue. But as the whole deed is inoperative without the schedule, and as the party is charged with having executed a deed referring to a certain supposed schedule as then annexed, the declaration in effect avers that the defendant executed a deed with such a schedule annexed at the time; and the proof being that he executed the instrument without any such schedule annexed, it is not the instrument which he is charged with having executed.

BAYLEY J. The plaintiff declares in substance that the defendant executed a scheduled instrument, which

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the defendant by his general plea denies; and it is part of the issue, the proof of which lies on the plaintiff, to shew that the defendant executed a scheduled instrument: this he has failed to prove. And it is material to the party, whether he is to be bound by that list of articles to be delivered which he executes at the time, or by one which is to be supplied afterwards, and which is to be proved by parol evidence to be the list which was to be annexed.

Rule absolute.

Monday, Nov. 25th.

SHAW *against* EVANS.

If the attorney employed to prepare a warrant of attorney to confess judgment, which is to be made subject to a defeazance, neglect to insert such defeazance on the warrant, which is required by rule of Court of *M.* 42 *G.* 3. the security is not thereby avoided against the innocent party, but the attorney is guilty of a breach of duty imposed on him by the Court, and answerable for it on motion.

THIS came on upon a motion by *Garrow*, for setting aside a judgment entered upon a warrant of attorney, and for restoring to the defendant the money levied in execution under it. It was moved upon an affidavit of the defendant, that in *October* 1810, being in insolvent circumstances, he compounded with his creditors for 10*s.* 6*d.* in the pound, payable by instalments, for which the plaintiff agreed to become his surety, and was to supply him with the money to take up his bills in payment of the instalments. That the warrant of attorney in question was executed on the 10th of *January* 1811, by the defendant to the plaintiff, to confess judgment for 12,000*l.*, as a security to the plaintiff for the sums he should pay on such bills to the composition creditors, *and that the warrant of attorney was to be subject to a defeazance to that effect.* That *C. W.*, an attorney of the Court, (who had been before employed by the defendant in the course of this transaction,) prepared the warrant of attorney, *but did not cause the said defeazance,*

ance, or any memorandum thereof, to be written on the said warrant. The defendant's affidavit alſo charged that the plaintiff had extorted from him a certain ſum as commiſſion for trouble in ſettling the debts; which had not been originally agreed upon; and that the judgment was entered up and execution taken out for an exceſs: but this was negatived by affidavits on the part of the plaintiff, which ſtated an original agreement to allow a commiſſion, and the reaſonableneſs of the charge made; and denied in a ſatisfactory manner that the judgment had been entered up and execution taken out for more than the ſum really due to the plaintiff, including ſuch commiſſion. And the plaintiff alſo ſtated that the defendant had agreed to execute the warrant of attorney without any defeazance. But the Court not being ſo well ſatisfied as to this latter point, the queſtion finally made and relied on by the defendant's counſel was upon the conſtruction of the rule of Court in *Mich.* 42 *G.* 3. (*a*); which directs that every attorney of this Court who ſhall prepare any warrant of attorney, which is to be ſubject to any defeazance, do cauſe ſuch defeazance, or a memorandum of the ſubſtance of it, to be written on the ſame paper, &c. on which the warrant of attorney is written. This not having been done in the preſent caſe was contended to avoid the warrant of attorney.

Park, contrà, denied this to be the fair conſtruction of the rule, or that the Court could have contemplated to make the party ſuffer for the negligence of the attorney employed to prepare the inſtrument, ſuppoſing the fact of negligence to exiſt. And by

(*a*) 2 *Eaſt*, 136.

Lord

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Lord ELLENBOROUGH C. J. In the fair and equitable conſtruction of the rule of Court, which now lies open before me, it would be the greateſt injuſtice to cut down the whole ſecurity of the party on account of the omiſſion of the attorney employed to prepare it. The Court only meant to impoſe a duty upon the attorney, as an officer of the Court, which if he has not duly exerciſed, the defendant may move the Court againſt him.

Per Curiam, Rule diſcharged.

Monday, Nov. 25th.

CARUTHERS and Another *againſt* GRAHAM and Another.

Indebitatus aſſumpſit lies to recover del credere commiſſions for guarantying ſums inſured upon policies; ſuch commiſſions being due upon entering into the contract of guarantie; and after judgment by default the defendants cannot be allowed, on a writ of inquiry, to ſet off in reduction of damages the amount of loſſes not indemnified.

THE plaintiffs declared againſt the defendants, for that they were indebted to them in ſo much, at ſuch a time, "for certain commiſſions before that time and then due and payable from the defendants to the plaintiffs, for and on account of the plaintiffs' having before then guarantied the payment of divers large ſums to the defendants upon certain inſurances before then effected by the plaintiffs, as the brokers and agents of and for the ſaid defendants, and at their ſpecial inſtance and requeſt. And being ſo indebted, the defendants in conſideration thereof, afterwards, &c. promiſed to pay to the plaintiffs the ſaid ſum when the defendants ſhould be thereunto afterwards requeſted:" and then the plaintiffs alleged a requeſt and refuſal. There were other counts in the declaration; but after judgment by default, and a general inquiſition of damages for the plaintiffs,

Taddy

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CARUTHERS *against* GRAHAM.

Taddy moved on a former day in arreft of judgment, on the ground that there was no inftance of a count fuftained upon a general indebitatus affumpfit for del credere commiffions, which are executory, and only become due upon the performance of the guarantie by the plaintiffs. Indebitatus affumpfit can only be maintained upon a confideration executed; and not, as it is faid in *Hard*'s cafe (*a*), upon mutual promifes, nor in any cafe but where debt lies. [Lord *Ellenborough* C. J. Both the confiderations need not be executed. If one of them be executed, may not the party declare upon that. If thefe commiffions be payable inftanter, they may be fued for immediately.] If this count be good in the form of it, the defendants ought to have been permitted to fhew, on the trial of the inquifition, that the plaintiffs had not performed their guarantie. [Lord *Ellenborough* C. J. The plaintiffs purchafed their right to prefent commiffions by giving the defendants the contract of guarantie. *Le Blanc* J. The defendants, by fuffering judgment by default, admit that the plaintiffs are entitled to recover fomething. If the motion be made on the ground of the defendants having been excluded from giving evidence in reduction of the damages, there ought to be an affidavit of the facts.] The objection arifes as well on the face of the count: the defendants do not admit, by fuffering judgment by default, that the plaintiffs are entitled to recover upon all the counts; and unlefs the confideration be executed, this count cannot be maintained. The plaintiffs ought not to be permitted to recover their commiffion as upon a contract executed, when in fact they have broken their contract.

(*a*) 1 *Salk.* 23.

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CARUTHERS *against* GRAHAM.

Lord ELLENBOROUGH C. J. The right to receive the commissions is not to be in abeyance till the event is determined, but the brokers are entitled to be paid immediately. It is a price payable for a contract of indemnity, and the party engaging for it is not to wait for his price till the indemnity is ascertained. But take the rule in the alternative, either to set aside the inquisition, or to arrest the judgment.

Marryat now shewed cause, first, against the rule for arresting the judgment. A commission del credere is no other than a guarantie for the solvency of others on whom the party contracting for the guarantie does not choose to rely; and such commission is due immediately upon entering into the contract, and cannot depend upon the event; for if there were no loss of the ship, there would be nothing for the guarantee to perform; and then, according to the argument, there would be no consideration for the commission.

Lord ELLENBOROUGH C. J. said, that he need not labour that point: it was clear that the commission was earned and to be paid to the party for entering into the contract of guarantie, and not in respect of the event, which was perfectly collateral.

The other judges agreed, and

BAYLEY J. added, that by suffering judgment to go by default, the defendants admitted that it was such a guarantie on which the commission money would be due upon request. And why, he asked, might not the defendants make a bargain with the plaintiffs, that if they

would guaranty the ſolvency of the underwriters, they, the defendants, would pay them a preſent ſum. 1811.

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Taddy on this point ſaid that a guarantie was no more than a promiſe, and the contract was one of mutual promiſes, on which an indebitatus aſſumpſit did not lie, according to the caſe before cited. That the commiſſion only became due when the contract was executed, which it was, as well when the ſhip arrived ſafe without loſs, as when a loſs happened for which the guarantee indemnified the other contracting party.

The Court, however, ſtill expreſſed themſelves of the ſame opinion.

Upon the other part of the rule for a new inquiry, *Marryat* ſhortly obſerved that the claim of the defendants was in effect to be allowed to ſet off the amount of the loſs againſt the claim for commiſſion; but that the ſet-off could not be allowed upon the writ of inquiry. *Taddy*, contrà, ſaid that the defendants did not claim the allowance by way of ſet-off, but in reduction of damages. But the Court diſcharged the rule generally.

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Tuesday, Nov. 25th.

WILLIAMS *against* EVERETT and Others.

Kelly, refiding abroad, having remitted bills on *England* to the defendants, his bankers in *London*, with directions in the letters inclofing fuch bills to pay the amount, in certain fpecified proportions, to the plaintiff and other creditors of *Kelly*, who would produce their letters of advice from him on the fubject; and defiring the amount paid to each perfon to be put on the back of their refpective bills, and that every bill paid off fhould be cancelled: and the plaintiff having, before the bills became due, given notice to the defendants that he had received a letter from *Kelly*, ordering payment of his debt out of that remittance, and having offered them an indemnity if they would hand over one of the bills to him; *but the defendants having refufed to indorfe the bill away, or to act upon the letter*; admitting, however, that they had received the directions to apply the money: and the defendants having in fact afterwards received the money on the bills when due: held that they did not by the mere act of receiving the bills and afterwards the produce of them, with fuch directions, and without any affent on their part to the purport of the letter, and ftill more againft their exprefs diffent, bind themfelves to the plaintiff fo to apply the money in difcharge of his debt due to him from *Kelly*; and confequently that the plaintiff, (between whom and the defendants there was no privity of contract, exprefs or implied, but on the contrary it was repudiated,) could not maintain an action againft the defendants as for money had and received by them to his ufe. But that the property in the bills and their produce ftill continued in the remitter.

THE plaintiff declared in this action for money had and received by the defendants to his ufe, and upon an account ftated; and fought to recover two feveral fums of 300*l.* and 500*l.*, part of two remittances by bills for 1126*l.* and 1000*l.*, made by one *James Kelly* from the *Cape of Good Hope* to the defendants as his bankers, and which part remittances the plaintiff, who was a creditor of *Kelly* to the amount of the 800*l.*, claimed to receive from the defendants by virtue of *Kelly*'s appropriation of the feveral fums to be paid to his ufe, contained in certain letters, inclofing thofe bills, addreffed by *Kelly* to the defendants. *Kelly*, who was a merchant at the *Cape*, being indebted to feveral perfons refiding in *London*, remitted the firft fet of bills, to the amount of 1126*l.*, to the defendants, accompanied by a letter, dated at *Cape Town*, *July* 8th, 1809, in which he fays, "I embrace this opportunity by the *Worley* Indiaman, to remit you 1126*l.*, which I particularly requeft you will order to be paid to the following perfons, who will produce their letters of advice from me on the fubject:— Mr. *Williams* (the plaintiff) 300*l.*;" (then followed a lift of various other creditors, between whom the refidue of

the

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the amount was apportioned.) "This being the whole of the sum inclosed, I humbly beg you will order that the amount paid to each person is put on the back of their respective bills." *Kelly* afterwards sent to the defendants a further remittance of 1000*l.* by bill; and by another letter of the 19th of *January* 1810, directed the bill to be paid, in certain proportions, to certain persons, one of whom was the plaintiff, who was to receive 500*l.* The defendants were permitted, under an order of the court of Chancery, to give in evidence under the general issue, that previous to and at the time when the money due on the bills remitted were received by the defendants, foreign attachments had issued out of the mayor's court of *London*, within whose jurisdiction they carried on their banking business, by which the proceeds were attached in their hands at the suits of several creditors of *Kelly*, and judgments were obtained by some of them, (and the proceedings of others were suspended by injunction) against the defendants as garnishees in those actions, who were obliged to pay the amount of such judgments: and admissions to this effect were agreed to be read at the trial. But when the cause was tried before Lord *Ellenborough* C. J. at *Guildhall*, though these admissions were stated, yet the principal stress was laid, and his Lordship's opinion was ultimately given, upon a fact proved by a witness examined; that when the plaintiff applied to the defendants before the first set of bills became due, and represented to them that he had received a letter from *Kelly*, directing 300*l.* to be paid to him out of the money sent to the defendants, and proposed to them an indemnity if they would indorse or hand over to him one of the bills remitted to that amount; the defendants refused to do so, or to act upon the letter,

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although they admitted the receipt of it, and that the plaintiff was the perſon to whom the ſum in queſtion was directed to be appropriated. The defendants afterwards received the money upon the bills; and it was contended on the part of the plaintiff, that by ſo doing they had irrevocably acceded to the appropriation of it, as directed in the letters of advice from *Kelly* the remitter. But his Lordſhip thought that having renounced the terms on which the bills were remitted, before the money was actually received, it was only money had and received to the uſe of the remitter of the bills; and therefore nonſuited the plaintiff, but reſerved the point.

Park accordingly moved in laſt *Hilary* term for a rule to ſet aſide the nonſuit, upon the ground that if a party to whom a remittance is ſent conſent to receive it at all, he is bound to receive it upon the terms offered; and therefore that the defendants in this caſe, having received the bills in a letter directing the appropriation of the money when received to the uſe (amongſt others) of the plaintiffs, muſt be taken to have aſſented to receive the appropriated ſum to their uſe. And as to the defendants having refuſed to bind themſelves to pay over the money; that was only becauſe they were afraid of having the bills attached in their hands by other creditors of *Kelly*. But, as he was informed, bills of exchange were not attachable by the cuſtom of *London* (*a*): and at any rate

(*a*) Sed vide *Andrews* v. *Clarke*, *Carth.* 26. where it is ſaid that "It was always the cuſtom in *London* to attach debts upon bills of exchange and goldſmith's notes, &c. if the goldſmith who gave the note, or the perſon to whom the bill is directed, liveth within the city, without any reſpect had to the place where the debt was contracted. But ſee 7 *Vin. Abr.* 227. *pl.* 20. and what was ſaid in argument in *M'Daniel* v. *Hughes*, 3 *Eaſt*, 371. 375.

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if the money were appropriated in the firft inftance to the payment of the plaintiffs and other fpecified creditors, it could not be attached in the hands of the defendants by other creditors of *Kelly*, as it would not be *Kelly*'s money; and the defendants therefore fhould have refifted the attachment. In *Eafter* term following.

The Attorney-General, *Bolland*, and *Newnham* fhewed caufe againft the rule, and contended that the property remitted to the defendants by *Kelly*, whether as bills, or as money, the produce of thofe bills, continued to be the property of the remitter, until the defendants had done fome act to transfer it to the plaintiff, and the other fpecific appointees of *Kelly*, either by the actual payment of the money to them, or by agreeing to hold it for their ufe, neither of which was done in this cafe: and that in the meantime *Kelly* might have revoked his original order for the appropriation of it. And if it ftill continued the property of *Kelly* in their hands, it was neceffarily attachable in the mayor's court in any fuit againft *Kelly*, in which they were the garnifhees. They further contended that it had been already decided by the judgments in the mayor's court, that this was the property of *Kelly* at the time when it was attached in the hands of the defendants, the garnifhees in thofe fuits; and that they, having been held anfwerable to the plaintiffs in thofe fuits, could not be liable in juftice to pay the money over again to the prefent plaintiff, but might protect themfelves by thofe judgments (*a*). Upon the firft point, they argued that this was very different

(*a*) Vide 7 *Vin. Abr.* 235. *Cuftoms of London*, and *Hovil* v. *Browning*, 7 *Eaft*, 154.

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from the cafe where one pays in money at a banker's for the ufe of another; for there the money is in the firft inftance received as the money of the defignated payee. But if one pay a bill into his bankers, and direct them, when the money is received, to pay it over to others, the bill muft neceffarily continue the property of the payer; and as he may afterwards countermand the application any time before it is fo appropriated, or the order at leaft notified, the property in the money when received muft alfo continue in him until fuch appropriation (*a*) or notification. The falacy of the argument on the part of the plaintiffs lies in affimilating this to the cafe where a bill is remitted by one to the hands of another, clogged with a condition in favour of the remitter: there, it is true that the receiver of the bill cannot take it difcharged of the condition. But here the direction fent with the bills, to appropriate their contents when received, was no condition impofed by the remitter in his own favour, but was merely directory and executory, and transferred no property to the appointees till executed: they ftill remained in the meantime the bills or the money of the remitter, fubject to all the legal confequences of being his property, and amongft others, that of being attachable for his debt. What difference can it make for this purpofe whether a bill or money is remitted with orders to pay it over when received in fatisfaction of certain debts of the remitter, or for any other purpofe in difcharge or for the benefit of the remitter himfelf? If money were fent to a broker on the firft of *February*, with orders to lay it out in ftock for the remitter on the firft of *March*, though the broker could not appropriate it to the payment of his

(*a*) Vide *Crofsley* v. *Ham*, 13 *Eaft*, 501. 3, 4.

his own debt, or otherwise than as the principal appointed; yet it cannot be doubted that while the money was in his hands, it would be attachable by the custom at the suit of the principal's creditors. Now here, before the money, the produce of the bills, was appropriated by the defendants, it was attached, and the original destination of it revoked by the hand of the law, at the suit of *Kelly's* creditors, which bound the principal and his agents as much as if *Kelly* himself had countermanded his first orders in time, before the money was paid over, or the defendants had bound themselves to pay it over to the specific creditors. There was certainly no express engagement by the defendants; for they refused to bind themselves to pay over the proceeds of the bills to the plaintiff; and the only implied engagement the defendants had was with the remitter, and not with the plaintiff. As to the cases referred to (*a*), where the assignment of a debt has been held good in equity, and that after notice to the debtor, he would be bound to pay the money to the assignee, and not to the original creditor; whatever difficulty may attach upon those cases in a court of law, they differ materially from the present; for in each of them there was an

(*a*) These were referred to by *Park* in the course of the defendants' argument, which had been interrupted on one day, and resumed on another. *Row* v. *Dawson*, 1 *Ves* 331. *Ryall* v. *Rowles*, *ib.* 348. 362. 367. *Fenner* v. *Mears*, 2 *Blac. Rep.* 1269. and *Israel* v. *Douglas*, 1 *H. Blac.* 239. When the case of *Fenner* v. *Mears* was cited, Lord *Ellenborough* said he had read it twice, and must read it again before he assented to it. That it was well put, however, in *Israel* v. *Douglas*, and he did not mean to deny its authority, but only to suspend his opinion upon it till further consideration. Lord *Kenyon* also doubted the same case in *Johnson* v. *Collins*, 1 *East*, 104. With respect to *Israel* v. *Douglas*, Lord *Ellenborough* said that he did not feel the same difficulty, because it was an accepted transfer: it was money had and received by the operation of the agreement.

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assent to the transfer on the part of the original debtor; which assent was negatived in this case. Upon the second point, they contended that the judgments in the mayor's court for attaching the money in the hands of the defendants, as garnishees, at the suit of *Kelly*'s creditors, which were judgments in rem, were conclusive in favour of the defendants in this action, that it was the money of *Kelly*. [Lord *Ellenborough* C. J. It will not, I presume, be contended, that if the money were attachable, the judgments of the mayor's court would not protect the defendants.] But admitting, for argument sake, that the mayor's court had been mistaken in their judgments, they would still be sufficient to protect the garnishees, who had the property thus taken from them by the act of the law, which they could not resist. The judgment of a court of competent jurisdiction is always sufficient to protect a payment made under the compulsion of it, whatever the merits of the judgment may be. As if a trader, after an act of bankruptcy objected to him, recover judgment and have execution against his debtor; that will protect the latter against a subsequent claim by the assignees of such bankrupt (*a*). So payment to an executor, who had obtained probate of a false will, was deemed sufficient to protect the payer, though the probate was afterwards declared null; for while it was in force he was bound to give credence to it, as the judgment of a court of competent jurisdiction. [Lord *Ellenborough* C. J. observed, that no question was made at the trial as to the effect of the foreign attachments, though they were mentioned, and the admission respecting them was put in; but the nonsuit pro-

(*a*) *Foster* v. *Allanson*, *Co. Bank. L.* 588. last edit.
(*b*) *Allen* v. *Dundas*, 3 *Term Rep.* 125.

ceeded

ceeded upon the other point.] The bankers are entitled to defend themselves upon both points. The bills were attached in their hands before they were converted into money; for it was in evidence that when they were applied to by the plaintiff, they told him that there were attachments, and that they could not undertake to pay over the proceeds to him. [Lord *Ellenborough* then said that the defendants' counsel had a right to assume that, before the bills were converted into cash, there were attachments on the proceeds; or at least that the instant they were converted into money, it was attached in the hands of the defendants, before they could pay it over.]

Marryat (*b*), in support of the rule, argued that no express consent of the remittees was necessary in a case where, like the present, there was an original appropriation directed of the fund remitted to them, as there would be in the case of an antecedent debt, which was to be transferred: but as the fund remitted came into the defendants' hands, already appropriated to the use of others, the defendants could not take the bills, or the money which they produced, and reject the trust; but must reject or accept the whole upon the terms offered. By their consenting therefore to hold the bills, they clothed themselves with the trust for the specific creditors, for whose benefit they were remitted, and whose property they thereby became. It is admitted that the defendants could not have applied the bills, or the money when received, to satisfy any demand of their own against *Kelly*. This was expressly held in a late case

(*a*) *Park*, who moved the rule, was absent at this time from indisposition.

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before this court, of *De Bernales* v. *Fuller* and others, in *Hilary* 50 *Geo.* 3. (*a*), where money paid into a banking house, for the purpose of taking up a particular bill, which was lying there for payment; though the banker's clerk said at the time that he could not give up the

(*a*) The short statement of that case, so far as is sufficient to raise the question, appears by my note to be this. *Puller* had accepted a bill for 894*l.* 16*s.* 9*d* payable at *Fullers'* banking-house, of which bill the plaintiff *De Bernales* became the holder, and sent it to his bankers, the *Newnhams*, to receive payment when due. By exchange of bills amongst the bankers the bill in question was lodged by *Newnhams* with the *Fullers*, as the banking house where it was made payable. When the bill became due *Puller*'s clerk went to *Fullers'* and told their clerk, whom he saw there, that he had brought the money to take up the bill, and he laid the money down upon the counter and demanded the bill. *Fullers'* clerk took up the money and kept it; but did not deliver up the bill; saying that he would first speak to *Fuller*: and the bill was not delivered up, nor the money received by *Newnhams* for *De Bernales*. (There being, it seemed, some account between *Puller*, the acceptor, and *Fullers* the bankers, which gave the latter, as they supposed, a lien upon this money.) Whereupon *De Bernales*, the owner of the bill, brought this action against the *Fullers* for money had and received to his use, considering the money as having been paid to and received by them for the use of the holder of the bill, whoever he might be, at the time when it became due. But at the trial before Lord *Ellenborough* C. J., at the sittings after *Michaelmas* term, at *Guildhall*, his Lordship thought that there was no privity proved between *De Bernales* and the *Fullers*, so as to sustain this action; considering that the evidence did not establish a receipt of this money for the intended purpose for which it was directed to be paid in, namely, to take up the bill; but rather a waver of receiving the money for that purpose by the defendants' clerk, and a determination of the defendants to hold it for their own use; which made them wrongdoers; and therefore that the action should rather have been trover. And under this direction there was a verdict for the defendants. But afterwards, in *Hilary* term 50 *Geo.* 3. a new trial was moved for on the part of the plaintiff, or leave to enter a nonsuit. And finally, in the same term,

The Court, after much discussion, made the rule absolute for a new trial; considering, as it appeared, that the money having been expressly paid in to the defendant's house for the specific purpose, declared at the time, of taking up this bill; and that purpose not having been directly repudiated till afterwards; it must be taken to have been received at the time for the use of the holder of the bill. See a further account of this case in the judgment of the Court: and see the report of the second trial in 2 *Campb. N. P. Cas.* 426.

bill

bill till he had feen his mafter; was held to be money had and received to the ufe of the then owner and holder of the bill, and could not be applied by the bankers to the general account of the acceptor who paid in the money. Then how could any other general creditor of *Kelly* ftand in a better fituation than the defendants would have done had they been creditors of his? It is alfo admitted that unlefs *Kelly* could have countermanded the original deftination of the money, it could not be confidered as his property, for the purpofe of being attached: but *Kelly* had not only appropriated the produce of the bills in the firft inftance of the remittance, but he had alfo advifed the plaintiff and the other fpecific creditors of fuch remittance, and notified that fact to the defendants; after which he could not have countermanded the order, any more than one who with the knowledge of certain of his creditors pays money into a banker's for their ufe in certain proportions. But even if *Kelly* himfelf could have countermanded the directed appropriation, no other perfon could, without his concurrence: and here the original truft remained unrevoked by *Kelly*. Truft-money is not the fubject of a foreign attachment, whether it be affigned to the holder by deed of truft, or by any collateral inftrument, where the agreement or direction under which it is received is for a valuable confideration, and has been notified to the party for whofe benefit it was intended. In *Lewis* v. *Wallis* (*a*) a debt before affigned to another for a valuable confideration was held not to be attachable in the hands of the original debtor, in a fuit againft the original creditor who had fo affigned it, and who was deemed to be a truftee for his affignee. *Winch* v. *Keeley* (*b*) went on the fame principle: there a debt

(*a*) *T. Jones*, 222. (*b*) 1 *Term Rep.* 619.

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due to a bankrupt, as truftee for another to whom he had affigned it before his bankruptcy, was held not to pafs to his affignees under the commiffion, but that the affignee of the debt was ftill entitled to fue the original debtor in the name of the bankrupt. And by *Carpenter* and others, affignees of *Fowler*, v. *Maxwell* (*a*), fuch action can only be brought in the name of the bankrupt, and not by his affignees. [Lord *Ellenborough* C. J. defired to hear the caufe argued upon the terms of the letters remitting the bills; whether they created an abfolute truft in the firft inftance for the plaintiff and the creditors named; or whether other things were not firft required to be done; as that thofe creditors fhould produce their letters of advice; and then the money due on the bills was to be received by the defendants, by whom the payments over were afterwards to be made, and the amount paid to the feveral creditors was to be indorfed on their refpective bills. Several things therefore remained to be done, or to be procured by the defendants to be done, before the plaintiff was entitled to receive the money: and if in the mean time the bills had been burnt or ftolen, the lofs would have fallen either upon *Kelly* or upon the defendants, and not upon the plaintiff. The plaintiff had no intereft in the bills themfelves, but only, if at all, in the money which they produced. Then before thofe executory acts were done, which were to raife the interefts of the plaintiff and the other creditors in the property, the attachments came in, and intercepted the intended appropriation.] In *Haille* v. *Smith* (*b*), where goods fhipped were agreed to be configned by a trader before his bankruptcy, as a fecurity for a loan of money advanced,

(*a*) 3 *Bof. & Pull.* 40. (*b*) 1 *Bof. & Pull.* 563.

and

and the bill of lading was indorsed and transmitted to the lenders, but the ship and goods were stopped by an embargo until after the bankruptcy of the trader; though if the goods had been burnt before delivery to the indorsees of the bill of lading, the loss would have been the consignor's; yet the goods being under a trust were held not to pass under the assignment of the commissioners, but to be recoverable in trover by the indorsees of the bill of lading. So a creditor for whose benefit goods were voluntarily consigned by his debtor to a third person, to whom the bill of lading was indorsed, was held in *Hill* v. *Secretan* (*c*) to have an insurable interest in the goods so consigned. [Lord *Ellenborough* C. J. It is no question in such cases whether or not the interest in the property insured is absolutely vested in the assured.] There must be either a legal or an equitable interest in the subject-matter of the insurance; and the latter is sufficient to prevent the property from being attached for the debt of the original owner. If a creditor agree to take the goods of his debtor, then upon a wharf, in payment of his demand, and take an order for the delivery of them upon the wharfinger; could those goods be attached for the debt of the assignor before the wharfinger assents to the delivery? In *Harman and Others, Assignees of Dudley*, v. *Anderson and Others* (*b*), the vendee of goods having received from the vendor an order for delivery of part of the goods then lying in the defendants' warehouse, sent it to the defendants, who made no transfer in their books to his name, nor did any other act to testify that they held the goods on the vendee's account: yet Lord *Ellenborough* held that the wharfingers, after

(*a*) 1 *Bos. & Pull.* 315. (*b*) 2 *Campb. N. P. Cas.* 245.

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the delivery of the order to them, were bound to hold the goods on account of the purchaser, and that the vendor's right to stop in transitu was gone. In another case of *Bolton* v. *Puller and Others, Assignees of Forbes and Gregory* (*a*), the property in a bill remitted by the post to creditors was held not to be intercepted by the bankruptcy of those creditors. But the case of *Brand* v. *Lisley* (*b*) bears most strongly on the present. There the plaintiff declared that whereas one *W*. was indebted to him in 100*l*., and had delivered to the defendant certain goods to satisfy that debt; and whereas the plaintiff required the defendant to satisfy the 100*l*. with the goods in his hands; the defendant, in consideration that the plaintiff would forbear him for a certain time, promised by a certain day to pay the debt; and then alleged a breach of such promise. After verdict for the plaintiff, it was moved in arrest of judgment, that there was no consideration for the promise on the part of the defendant; for he had no benefit by the goods. But it was adjudged for the plaintiff: *for by the delivery of the goods to the defendant to satisfy the plaintiff the* 100*l*., *the plaintiff had an interest and property in the goods*; and then by the plaintiff's forbearance of the defendant for a time, *the goods being due to the plaintiff immediately*, the defendant had a benefit and quid pro quo. [*Bayley* J. observed that in the case cited, the defendant had agreed to accept the goods upon those terms, and held them afterwards for the plaintiff by his consent. And Lord *Ellenborough* C. J. said, that it would have brought this case nearer to the other, if when the defendants were applied to by the plaintiff, they had engaged to apply the proceeds of the bills to

(*a*) 1 *Bos.* & *Pull.* 539. (*b*) *Yelv.* 164.

the

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the payment of this demand; but on the contrary, the defendants had refused to do so.] He also urged another point, that a foreign attachment was neither pleadable in bar, nor could be given in evidence on the general issue before condemnation, according to *Brook* v. *Smith* (*d*); and here there were only two attachments on which judgments of condemnation were obtained: and though by virtue of the Lord Chancellor's order the other attachments might be given in evidence under the general issue; yet it was still open to the plaintiff to shew that the property was not attachable, being held by the defendants clothed with a trust at the time.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. now delivered the judgment of the Court.—This was a case argued in this court, in the last *Hilary* and *Easter* terms, on a motion to set aside a nonsuit, which took place at a trial before me at the sittings at *Guildhall* after last *Michaelmas* term. The action was for money had and received, brought by the plaintiff to recover 300*l.*, being part of the amount of a bill of 1126*l.* 2*s.*, remitted by one *James Kelly* from the *Cape of Good Hope* to the defendants' house, in a letter dated *Cape Town*, 8th *July* 1809; in which *Kelly* says, "I remit you by the *Warley* 1126*l.* 2*s.*, which I particularly request you will order to be paid to the following persons, who will produce their letters of advice from me on the subject," &c. Amongst the persons, he names the plaintiff *Williams* (wine merchant, *Gracechurch-street*,) for 300*l.* And he afterwards made another remittance for 500*l.* on the same terms. And then he adds; "I desire the amounts paid each

(*d*) 1 *Salk.* 280. See *Savage*'s case, *ib.* 291. which was also referred to.

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person to be put on the back of their respective bills," &c. "and that every bill paid off be cancelled." *Williams* by his attorney, long before the bills became due, gave the defendant *Everett* notice of a letter he had received from *Kelly*, ordering his debt of 300*l.* to be paid out of that remittance, and offered him an indemnity of a banking-house if he would hand over the bill to him; but *Everett refused* to indorse the bill away, or *to act upon the letter*; admitting, however, that he had received the letter directing the application of the money in the manner already stated. The question at the trial was whether the plaintiff was entitled to receive from the defendants the amount of his demand on *Kelly* for 300*l.* out of the bill for 1126*l.* . *s.* which was admitted to have been received by the defendants when it became due. A point has been discussed in argument, which did not arise in this case at nisi prius; namely, on the effect of a foreign attachment laid on the money in the hands of the defendants; but as the nonsuit was pronounced independently of any such evidence, and before any proof of the foreign attachment was given or tendered, it is fit to consider the propriety of the nonsuit, without reference to such circumstance; it being our opinion, independently of that circumstance, that the nonsuit was right. The question which has been argued before us is whether the defendants, by receiving this bill, did not accede to the purposes for which it was professedly remitted to them by *Kelly*, and bind themselves so to apply it; and whether, therefore, the amount of such bill paid to them when due did not instantly become by operation of law money had and received to the use of the several persons mentioned in *Kelly*'s letter, as the creditors in satisfaction of whose bills it was to be applied, and of course, as to

 300*l.*

300*l.* of it, money had and received to the uſe of the plaintiff. It will be obſerved that there is no aſſent on the part of the defendants to hold this money for the purpoſes mentioned in the letter; but, on the contrary, an expreſs refuſal to the creditor ſo to do. If, in order to conſtitute a privity between the plaintiff and defendants as to the ſubject of this demand, an aſſent expreſs or implied be neceſſary, the aſſent can in this caſe be only an implied one, and that too implied againſt the expreſs diſſent of the parties to be charged. By the act of receiving the bill, the defendants agree to hold it till paid, and its contents when paid, for the uſe of the remitter. It is entire to the remitter to give, and countermand, his own directions reſpecting the bill as often as he pleaſes, and the perſons to whom the bill is remitted may ſtill hold the bill till received, and its amount when received, for the uſe of the remitter himſelf, until by ſome engagement entered into by themſelves with the perſon who is the object of the remittance, they have precluded themſelves from ſo doing, and have appropriated the remittance to the uſe of ſuch perſon. After ſuch a circumſtance, they cannot retract the conſent they may have once given, but are bound to hold it for the uſe of the appointee. If it be money had and received for the uſe of the plaintiff under the orders which accompanied the remittance, it occurs as fit to be aſked, *when* did it become ſo? It could not be ſo before the money was received on the bill becoming due: and at that inſtant, ſuppoſe the defendants had been robbed of the caſh or notes in which the bill in queſtion had been paid, or they had been burnt or loſt by accident, who would have borne the loſs thus occaſioned? Surely the remitter *Kelly*, and not the plaintiff and his other creditors, in whoſe

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whofe favour he had directed the application of the money according to their feveral proportions to be made. This appears to us to decide the queftion: for in all cafes of fpecific property loft in the hands of an agent, where the agent is not himfelf refponfible for the caufe of the lofs, the liability to bear the lofs is the teft and confequence of being the proprietor, as the principal of fuch agent. The cafe of *De Bernales* v. *Fuller and Co.*, which has been urged in argument on the part of the plaintiff, is clearly diftinguifhable from the prefent by this circumftance, that the defendants in that cafe, *i. e. Fuller* and Co., had antecedently received the bill, which was to be paid at their houfe, from *Newnham* and Co., the bankers of the plaintiff *De Bernales*, the holder, for the very purpofe of receiving payment for them, the *Newnhams*, of fuch bill: and having taken the bill for this purpofe, the Court thought that *Fuller* and Co. could not by themfelves or their clerk renounce this purpofe, but muft apply the money, brought by *Fuller*'s clerk fpecifically for the difcharge of that bill then lying at their houfe, to that very purpofe and no other; and that they were in effect to be regarded in that cafe as the plaintiff *De Bernales*'s agents, through the intervention of *Newnhams*' houfe, for the purpofe of that receipt, and could therefore hold and apply it to no other. Here no agency for the plaintiff ever commenced, but was repudiated by the defendants in the firft inftance. We are of opinion, therefore, that upon no principle of law can the defendants be faid to ftand in fuch privity in refpect to the plaintiff, as that the 300*l.* claimed by this action can be faid to have been money had and received to the plaintiff's ufe: of courfe, therefore, the nonfuit muft ftand, and the rule for fetting it afide be difcharged.

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MANNIN *against* PARTRIDGE and Another, Bail of GODSHALL.

Tuesday, Nov. 27th.

The bail are entitled to be discharged upon their bankrupt principal's obtaining his certificate before the time allowed to them by the indulgence of the Court for rendering their principal is out, *i. e.* before the appearance-day of the last scire facias. But the bail not having applied in time to enter an exoneretur on the bail-piece, till after the money levied upon them, they can only be relieved on payment of costs.

FINAL judgment was obtained against *Godshall*, the principal, in last *Hilary* term, and a writ of capias ad satisfaciendum was left at the sheriff's office on the 4th of *February*, returnable the 12th, and was duly returned non est inventus; after which the first writ of scire facias was left with the sheriff on the 22d of *April*, and the second on the 13th of *May*; both of which were returned nihil; and on the 3d of *April* the principal obtained his certificate under a commission of bankrupt issued on the 5th of *December* last: and the question was whether the bail were thereby discharged. This point was argued in the last term, upon a rule for setting aside the judgment and subsequent execution against the bail, upon payment of costs, (on account of the lateness of the application for the relief of the bail,) and for returning the money levied to the bail, by *Park* for the plaintiff, and *Dampier* for the bail. After which the matter stood over for the further consideration of the Court. And now

Lord ELLENBOROUGH C. J. delivered their opinion. This was an application to set aside the judgment and execution against the bail, upon payment of costs, and for returning to the bail the money levied: and the ground of the motion was, that after the return of the capias ad satisfaciendum against the principal, and before the first scire facias against the bail was delivered to the sheriff, the principal obtained his certificate, which discharged

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charged him from the debt. And the queftion was, whether the principal's certificate at that period, after the capias ad fatisfaciendum was returnable, but before the time allowed the bail by the indulgence of the Court for rendering the principal had expired, entitled the bail to be relieved. And we are of opinion that it did. In *Woolley* v. *Cobbe*, 1 *Burr.* 244. this diftinction was made, that if the certificate were obtained before the bail were fixed, they were entitled to be difcharged: but if they were fixed before the certificate obtained, they remain liable. And accordingly in that cafe, where the certificate was not obtained until after judgment and execution againft the bail, the Court refufed to relieve them. Bail are to fome purpofes faid to be *fixed* by the return of non eft inventus upon the capias ad fatisfaciendum; but if they have, by the indulgence of the Court, time to render the principal until the appearance-day of the laft fcire facias againft them, and which they have the capacity of ufing, they cannot be confidered as completely and definitively fixed till that period. As therefore the principal obtained his certificate before their time for rendering was out, and therefore before they were fully and finally fixed; as the principal would have been entitled to an immediate and unconditional difcharge had he been rendered; and as the bail would have been entitled to have had an exoneretur entered on the bail-piece had they applied for it; we are of opinion that they are entitled to the indulgence they now afk upon the terms on which they afk it, namely, on payment of cofts; and therefore that the rule fhould be abfolute (*a*).

(*a*) Vide *Southcote* v. *Braithwaite*, 1 *Term Rep.* 624.; and *Phillips* v. *Brown*, 6 *Term Rep.* 282.

DOE, on the joint and feveral Demifes of HUNT and Others, *againft* MOORE and Others.

Wednefday, Nov. 27th.

Under a devife of real eftate in fee to *J. M.* *when he attains the age of* 21; but in cafe he dies before 21, then to his brother *when* he attains 21, with like remainders over; *J. M.* the devifee takes an immediate vefted intereft, liable to be devefted upon his dying under 21.

THIS was an ejectment to recover poffeffion of certain premifes in the parifhes of *Alvechurch* and *King's Norton*, in the county of *Worcefter*. The demifes were laid on the 29th of *May* 1806; and the caufe was tried before *Le Blanc* J. at the *Worcefter Summer* affizes 1806, when a verdict was found for the plaintiff, fubject to the opinion of this Court on the following cafe.

James Moore being feized in fee of certain eftates in *King's Norton* and *Alvechurch*, (of which the premifes in queftion are part,) by his will, dated the 28th of *March* 1801, devifed as follows: "Alfo I give and "devife to *John Moore*, fon of my faid coufin *John* "*Moore* aforefaid, *when he attains the age of* 21 *years*, "all that my eftate fituate in the parifh of *Alve-* "*church* aforafaid, and now in the occupation of my "tenant *James Haynes*; to hold to him his heirs and "affigns for ever: but in cafe he fhould die before he "attains the age of 21 years, then I give and devife "the laft mentioned eftate to his brother *James Moore*, "when he attains the age of 21 years, to hold the fame "to him, his heirs and affigns for ever. Alfo, I give and "devife to the faid *James Moore*, *when* he attains the "age of 21 years, all that my eftate fituate in the "parifh of *Alvechurch* aforefaid, and now in the oc- "cupation of my tenant *Avery*, and alfo all thofe my "two eftates fituate in the parifh of *King's Norton*, in "the

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"the county of *Worcester* aforesaid, and now in the "occupations of my tenants *Job* and *John Brittle*, and "*D. Milles*, to hold to him his heirs and assigns for "ever: but in case he should die before he attains the "age of 21 years, then I give and devise the four last "mentioned estates to his brother *Robert Moore*, son of "my said cousin *John Moore*, *when* he attains the age "of 21 years; to hold to him his heirs and assigns for "ever. Also I give and devise to the said *Robert* "*Moore*, *when* he shall attain the age of 21 years, all "those my two estates situate in the parish of *Alvechurch* "aforesaid, and now in the respective occupations of "my tenants *E. Clarke* and *H. Stibbs*, to hold the same to "him his heirs and assigns for ever: but in case he "shall die before he shall attain the age of 21 years, "then I give and devise the six last mentioned estates, "together with all that other estate situate in the parish "of *Alvechurch* aforesaid, and now in the occupation "of my tenant *T. Raybold*, to his brother *Charles Edward* "*Moore*, son of my said cousin *John Moore*, *when* he "attains the age of 21 years, to hold to him, his heirs "and assigns for ever: but in case he shall die before "he attains the age of 21 years, then I give and devise "the said seven last mentioned estates to all the daugh-"ters of my said cousin *John Moore* aforesaid, equally, "share and share alike, to hold to them as tenants in "common, and not as joint tenants, and to their heirs "and assigns for ever." The testator died in *July* 1805, leaving *Sarah Hunt* and *Samuel James Dawes*, two of the lessors of the plaintiff, his heirs at law. Upon the death of the testator, *John Moore* the defendant, and *Edward Moore*, in the name and on the behalf of the said *John Moore*, the son, *James Moore*, *Robert*

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Moore and *Charles Edward Moore*, the devisees named in the will, entered into the possession of the seven last mentioned freehold estates in the county of *Worcester*, and they are now in the possession of all the said premises. The said devisees *John*, *James*, *Robert*, and *Charles Edward Moore*, the sons of *John*, the testator's cousin, are all under the age of 21 years. *Elizabeth* the only daughter of the said *John Moore*, the cousin, has attained the age of 21 years (*a*). The question reserved was, whether the lessors of the plaintiff, or any or either of them, as heirs at law of the testator, or otherwise, take any, and what estate or interest in the said seven devised estates, or in any of them.

This case was argued so long ago as in *Hilary* term 1807, by *Jones* for the plaintiff, and *Wigley* for the defendants; when it was directed to stand over for consideration, under the circumstances stated in giving the judgment of the Court, which was now delivered by

Lord ELLENBOROUGH C. J. This is a case which has stood over a considerable time for the judgment of the Court, in consequence of a writ of error brought upon a judgment in the court of Common Pleas, in a case similar to this, and on the authority of which determination this case was said much to depend. That writ of error was argued and judgment given thereon in the House of Lords after the last *Trinity* term: it is therefore fit that judgment in this case should no longer be suspended. [Then after stating the facts of the present case, his Lordship continued.] On behalf of the plaintiff it was contended that the devisees attaining the

(*a*) The fact as to the ages of the devisees was afterwards added to the case originally stated.

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age of 21 years was a condition precedent to any estate vesting in them, and that in the mean time the same descended to the lessors of the plaintiff, who were the heirs at law of the testator. And the cases of a bequest of *personal* estate were relied on, where it has been held that a legacy given to one, if or *when* he shall attain 21, lapses in the event of the legatee dying under 21. And *Stapleton* v. *Cheales*, *Prec. in Chanc.* 317. *Goss* v. *Nelson*, 1 *Burr.* 226., as to what is there said by Lord *Mansfield* respecting legacies, and *Hanson* v. *Graham*, 6 *Ves. jun.* 239, were cited; and it was argued that there was no distinction between devises of *real* and bequests of *personal* estate in this respect. But that is not so; for the rules by which *legacies* are governed are borrowed all or the greater part from the civil law: whereas the decisions on the devises of *real* estate have established a different rule: and, according to them, a devise to *A.* *when he attains* 21, to hold to him and his heirs, and if he die under 21, then over, does not make the devisee's attaining 21 a condition precedent to the vesting of the interest in him; but the dying under 21 is a condition subsequent, on which the estate is to be devested. As in *Mansfield* v. *Dugard*, 1 *Eq. Ca. Ab.* 195., *Edwards* v. *Hammond*, 3 *Lev.* 132, and *Broomfield* v. *Crowder*, 1 *New Reports* 313; which latter case was affirmed in the House of Lords in *July* last. These we consider as authorities precisely in point, especially the last case, the pendency of which in the House of Lords was the occasion of our judgment in this case being deferred. To which may be added *Goodtitle* v. *Whitby*, 1 *Burr.* 228. These authorities were attempted to be distinguished, on the ground that they were cases of a *remainder*, and not of an *immediate devise*, as in the case here,

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here; but that forms no fubftantial ground of diftinction: the eftate vefts *immediately*, whether any particular intereft is carved out of it to take effect in poffeffion in the mean time, or not. And it is to be obferved that in the cafe of *Edwards* v. *Hammond*, *John Hammond*, the furrenderee, was allowed to maintain an ejectment at the age of 15; the particular eftate for life, which preceded his eftate, being expired; although he had not attained 21, the age in cafe of his dying under which, the eftate was to go over. We are therefore of opinion that in this cafe the plaintiffs, who are the heirs at law of the teftator, did not take any eftate or intereft in the premifes fo devifed, and that the poftea muft be delivered to the defendants.

Wednefday, Nov. 27th.

The King *againft* Hoseason.

Under the ftat. 20 *Geo.* 2. *c.* 19. *f.* 2. for regulating fervants in hufbandry, artificers, and other labourers there mentioned, if a juftice of peace, upon a complaint made to him of the mifconduct of fuch perfons in their employment, fentence the offender to be committed to the houfe of correction for a time not exceeding one calendar month, he muft, if he intend to proceed upon that ftatute, alfo fentence him *there to be corrected and held to hard labour*: but the ftatute gives the juftice an option to punifh the offender in that manner *or otherwife* by abating part of his wages, or by difcharging him from his employment. And the meaning of the terms "there *to be corrected*" is to be underftood of a correction *by whipping*. But this latter punifhment cannot be inflicted upon the like offenders under the ftat. 6 *G.* 3. *c.* 25. which enables the juftice *to commit the offender to the houfe of correction for any time not exceeding three months, nor lefs than one month*; nor can the punifhments inflicted by the two acts be blended.

The *employer* of the fervant is the mafter for whofe fervice he is retained, and not the bailiff of the farm, who in fact hires the fervant.

THE defendant, a magiftrate of *Norfolk*, having heard a complaint, referred to him in his judicial character by the bailiff of his own farm, againft one *G. Batterfby*, a labourer in hufbandry, who had been employed upon the farm by the bailiff, and was charged by him for mifconduct in his bufinefs, and refufal to perform his work, had fentenced *Batterfby* to be committed to the Houfe of Correction, "there *to be corrected*, and kept to hard labour for *one calendar* month;" whereupon a cri-

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a criminal information was moved for against the defendant, grounded upon special circumstances of alleged misconduct, as well in respect of the general complexion of the case, as having been guilty of particular oppression in giving that judgment: and *The Attorney-General* and *Best* were now heard in support of the rule for the information; and *Park*, *Alderson*, and *Abbott* for the defendant. In the course of the discussion a question arose, whether if the defendant committed *Battersby* to the House of Correction at all, he was not bound to sentence him also *to be there corrected*, by which was understood to be corporally corrected, by whipping; as had in fact been done; as to which the case stands thus:

By the stat. 20 *Geo.* 2. *c.* 19. for the better regulation of servants in husbandry, amongst others, it is enacted, (*s.* 2.) that it shall be lawful for one or more justice or justices of the peace of the county, &c. "upon application or complaint made upon oath by any master, mistress, or *employer*, against any such servant, &c. or labourer, touching or concerning any misdemeanor, miscarriage, or ill behaviour, in such his or her service or employment, to hear, examine, and determine the same; *and to punish the offender by commitment to the House of Correction, there to remain, and be corrected*, and held to hard labour for a reasonable time, *not exceeding one calendar month; or, otherwise*, by abating some part of his or her wages, or by discharging such servant, &c. from his, her, or their service or employment," &c. This was followed by the stat. 6. *Geo.* 3. *c.* 25. for the better regulating apprentices and persons working under contract; which reciting that artificers of several descriptions named, colliers, keelmen, &c. "*labourers*, and others who contract with per-

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" sons for certain terms, do leave their respective ser-
" vices before the terms of their contracts are fulfilled,
" to the great disappointment and loss of the persons
" with whom they so contract; for remedy enacts that
" if any artificer, &c., labourer, or other person, shall
" contract with any person whomsoever, for any time,
" &c., and shall absent himself from his service before
" the term of his contract shall be compleated, or be
" guilty of any other misdemeanor, it shall be lawful
" for any justice of the peace, &c., upon complaint
" thereof made upon oath to him by the person with
" whom such artificer, &c., labourer or other person
" shall have so contracted, or by his or her steward
" or agent, to issue his warrant for the apprehending
" every labourer, &c., or other person, and to examine
" into the nature of the complaint; and if it shall ap-
" pear to such justice that any such labourer, &c. or other
" person, shall not have fulfilled such contract, or hath been
" guilty of any misdemeanor, it shall be lawful for
" such justice *to commit* every such person *to the*
" *House of Correction* for the county, &c., for any
" time *not exceeding three months, nor less than one*
" *month.*"

The Court, upon consideration of the two statutes, were of opinion that if the commitment in question (which was for *one calendar month*) were intended by the magistrade to be made under the act of the 20 *Geo.* 2., *the correction* thereby directed (by which they understood corporal punishment by whipping, and which they considered the sentence in question to import, by the commitment to the house of correction, "*there to be corrected*,") was a necessary part of the judgment. But

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that under the latter ftatute, which enabled the juftice to commit the offender to the houfe of correction for any time not exceeding three months, nor lefs than one month, bodily correction was no part of the fentence: and they thought that the punifhments inflicted by the two acts could not be blended together, as they appeared to be by the precedent in *Burn's Juftice*, which, they faid, was incorrect in that refpect. But though the Court thought that the fentence pronounced by the defendant in this cafe was legal in the form of it under the act of the 20 *Geo.* 2., yet Lord *Ellenborough* C. J. in delivering their opinion upon that point, ftrongly expreffed his difapprobation of the conduct of the defendant for fitting in judgment as a magiftrate upon the imputed mifconduct of his own labourer, of which he himfelf was to be confidered as the complainant, though in form the complaint was preferred by his bailiff. It was impoffible, he obferved, to confider the defendant's bailiff as the *employer* of the labourer upon the defendant's own farm, within the fenfe of that word in the act, though the contract of hiring was made perfonally by the bailiff; and that it was a moft abufive interpretation of the law for a man to erect himfelf as a criminal judge over the fervants on his own farm for an offence againft himfelf. However, as the defendant appeared from the circumftances of the whole cafe to have acted in this refpect from an error of judgment rather than from any bad motive; and in the mode of punifhment adopted by him, which had been urged in aggravation, as evincing a vindictive motive, was probably mifled by the erroneous precedent in *Burn's Juftice*, which appeared to leave him no difcretion in ordering corporal punifhment; the Court finally difcharged the rule, upon the defendant's payment of all the cofts of the application.

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The KING *against* The Mayor, Aldermen, and Citizens of BATH.

Thursday, Nov. 28th.

The statute 6 G. 3. c. 70. for better supplying the inhabitants of *Bath* with water, reciting that there were springs of water in the neighbourhood belonging to the corporation, enacts that they shall have power and authority to cause the water to be conveyed from such springs to the city, and gives them authority to enter upon and break up the soil of any public highway, or waste, and the soil of any private grounds within two miles of the city, and the soil or pavement of any street within the city, in order to drain and collect the water of the said springs, and to make reservoirs and erect conduits, water-houses, and engines necessary for keeping and for distributing the water, &c. and to lay under ground aqueducts and pipes for the same purpose; and it vests the right and property of all these in the corporation. Held, that in addition to the springs, the corporation were liable to be rated for the reservoirs made by them in the parish of *Lyncomb* and *Widcomb* under the act, as for *land* occupied by them; which reservoirs, by means of aqueducts and pipes laid under ground, partly in the same parish, and through the parish of *St. James* into the parish of *St. Peter* and *St. Paul*, in *Bath*, for the supply of the city, produced to the corporation a clear annual profit of 600*l.* But that the corporation were not rateable for the whole of the entire profit in the first mentioned parish, in which the springs were first collected into the reservoirs; a proportion of such entire profit accruing to them from the under-ground aqueducts and pipes laid into the soil of the other parishes, in respect of which they were to be considered as the occupiers of land yielding annual profit in those parishes: and therefore a rate upon the entire profits arising out of all the parishes, made on the corporation in the first-mentioned parish, was held bad.

ON the 7th of *March* last, a rate of 9*d.* in the pound was duly made, allowed, and published for the relief of the poor of the parish of *Lyncomb* and *Widcomb*, in the county of *Somerset*, in which the corporation of *Bath* were rated, as occupiers of certain springs and reservoirs, in 22*l.* 10*s.* The corporation appealed against this rate, and the sessions confirmed it, subject to the opinion of this Court upon the following case.

The mayor, aldermen, and citizens of Bath were incorporated by a charter of Queen *Elizabeth*, renewed and confirmed by a charter of the 34th of *Geo.* 3. An act passed in the 6 *G.* 3. (*c.* 70.) intituled, an act for (amongst other purposes) better supplying the inhabitants of the said city, liberties, and precincts with water; which is declared to be a public act, and to be judicially noticed as such. This act (inter alia), after reciting that there was a scarcity of water within the city, liberties,

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and precincts, and that there were in the neighbourhood of the said city several springs of water belonging to the corporation, enacts that the corporation shall have full power and authority to cause water to be conveyed to the said city, liberties, and precincts from such springs, and gives them authority to enter upon and break up the soil of any public highway, or common or waste ground, and the soil of any private grounds within two miles of the city, and the soil or pavement of any street within the city, in order to drain and collect the water of the said springs, and to make a reservoir or reservoirs sufficient for keeping such water, and to erect conduits, water-houses, and engines necessary for distributing such water into the several parts of the said city, liberties, and precincts, and to lay under ground aqueducts and pipes most convenient for the same purpose. And the act vests the right and property of all watercourses leading from the said springs to the said city, and also of all reservoirs, conduits, water-houses, engines, buildings, aqueducts, and pipes erected or used for the purpose aforesaid, in the mayor, aldermen, and citizens of *Bath*. Under the power given by this act, the corporation made several reservoirs in the parish of *Lyncomb* and *Widcomb*, where the springs aforesaid are situated, in the neighbourhood of *Bath*; no part of the said city, liberties, and precincts lying within the said parish. These reservoirs are walled in and roofed. Aqueducts and pipes were also laid under ground for conveying the water, which first pass through a part of the said parish of *Lyncomb* and *Widcomb*, called *Holloway*, and from thence along a certain bridge called the *Old Bridge*, over the river *Avon*, into and through the parish of *St. James*, and the parish of *St. Peter* and *St. Paul*; which two

two pariſhes are within the city of *Bath*, its liberties and precincts. All the water flowing from the ſaid ſprings is collected into the ſaid reſervoirs, from each of which it is diſtributed by means of a mainpipe and cock, under the charge of an officer of the corporation, who has no reſidence upon the ſpot, but goes there twice a day, for the purpoſe of turning the cocks and diſtributing the water; and from theſe mainpipes it is diſtributed by ſmaller pipes to the houſes of various inhabitants both in that part of the pariſh of *Lyncomb* and *Widcomb*, called *Holloway*, and in the pariſhes of *St. James* and *St. Peter* and *St. Paul* aforeſaid; the cocks being turned at ſtated times by officers of the corporation. All the ſaid pipes are originally derived from and connected with the ſaid ſprings and reſervoirs in the ſaid pariſh of *Lyncomb* and *Widcomb*. The occupiers of the ſeveral houſes pay a rate to the corporation for the water with which they are reſpectively ſupplied; and the amount of this rate is in the diſcretion of the corporation. The corporation of *Bath* has been all along in the occupation of the ſaid ſprings and reſervoirs, and of the land included within the walls thereof; and they are the ſame ſprings and reſervoirs mentioned in the aforeſaid rate. The annual profits, ariſing to the ſaid corporation from the water thus diſtributed from theſe ſprings and reſervoirs, amount to 600*l.* in the whole, of which 50*l.* are collected from the occupiers of houſes in that part of the pariſh of *Lyncomb* and *Widcomb* called *Holloway*, and 550*l.* from the occupiers of houſes in the pariſhes of *St. James* and *St. Peter* and *St. Paul* in *Bath*. The whole of this 600*l.* is accounted for and paid at the office of the chamberlain of the corporation in *Bath*. The ſaid ſum of 22*l.* 10*s.* for which the ſaid ſprings and reſervoirs are rated, is *upon the whole ſum of*

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600*l*. The lands in which the said springs and reservoirs are situated, are rated separately in the names of the respective occupiers, exclusive of the said springs and reservoirs, and the land thereof. The questions saved for the opinion of the Court were, 1st, whether the corporation are liable to be rated at all, in respect of the said springs and reservoirs, to the poor of the parish of *Lyncomb* and *Widcomb*; and if so liable, 2dly, whether they were to be rated to the parish of *Lyncomb* and *Widcomb* upon the whole of the profits of the water which flows from the said springs and reservoirs, or only upon so much of those profits as are collected from the occupiers of houses within the said parish.

The Attorney-General, *C. F. Williams*, and *E. Lawes*, argued in support of rating the corporation for this property, and of laying the rate for the whole profits upon them in the parish of *Lyncomb* and *Widcomb*, where was the fountain head or principal reservoir in which the water was first collected, and from whence it was distributed to other places by means of pipes. They relied principally upon the case of *Atkins* v. *Davis* (*a*), as being in point, to shew that the subject matter, which in that case was the *London* bridge water-works, was rateable, and as shewing collaterally, in the opinion of *Buller* J. in this court, and of Lord *Loughborough* in the Exchequer-chamber, that the whole profits were rateable at the fountain head; though this point, they admitted, was not necessary to the decision of the case. It was argued in that case, that if the water had been carried from a pump in carts instead of pipes, the pump would not be

(*a*) *Cald.* 315. and a MS. note of the same case was also referred to.

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rateable for all the water carried from thence. But, said Mr. Justice *Buller* (*a*), "There is no difference with respect to a man's carrying water to a place where it is consumed, whether it is carried in pipes or in carts; it is quite immaterial. But I hold in the case put, that the pump would be rateable to the value of all the water carried from thence; for the pump is the permanent visible property, and the quantity of water carried from thence constitutes the produce of the pump. Suppose, (said he) a gardener contracts to serve twenty families, and carries all his crop to their different houses; certainly he would be rateable for the whole of his garden where his garden lies." So here, this is no more than the corporation sending the water from their reservoir in *Lydcomb* and *Widcomb*, where it is collected, to *Bath* market to be sold, and it makes no difference how it is conveyed there. [Lord *Ellenborough* C. J. The difference in the case of the water being conveyed by pipes into another parish is that the land of the other parish is made use of to earn the profit.] The same argument might be urged against the rule of rating adopted with respect to canals, the profits of which are only rateable at the termini (*b*); and yet the transit may be through intermediate parishes, the land of which is used for the purpose. Again, it was argued in that case (*c*), that supposing the property to be rateable, yet the rate was bad, because the constables had taxed more than they ought to have done; as many pipes, trunks, and branches lay out of the particular ward for which the rate was imposed, and even out of the

(*a*) *Cald.* 327.

(*b*) Vide *Rex* v. *The Staffordshire and Worcestershire Canal Company*, 8 *Term Rep.* 340. and the cases there cited; and, since that case, *Rex* v. *The Leeds and Liverpool Canal Company*, 5 *East*, 325.

(*c*) *Cald.* 329.

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city. But, ſaid the ſame learned Judge, "The whole property is rightly rated within the ward: the ſource of the property is there: the water is collected there by means of the fire-engine and other works fixed there; and there it firſt becomes the property of the plaintiffs," &c. Afterwards, when the caſe was carried to the Exchequer-chamber, Lord *Loughborough* C. J. of C. P., in delivering the judgment of that Court, ſpeaking of the nature of the property, ſaid (*a*), "It conſiſts in rents collected for the uſe of the water, diſtributed in the various parts to which the water runs: but the proper place where the value of the whole is to be taken is to be ſure at the fountain head, from whence the whole is diſtributed." Though he admits that it was ſufficient to warrant the levying of the diſtreſs for the rate, if any part of the property rated were rateable within the ward; the quantum being only the ſubject of appeal. [Lord *Ellenborough* C. J. Suppoſe the ſtreams of water were firſt collected in a reſervoir in the pariſh of *A.*, and from thence conducted into another reſervoir in *B.*, from whence it was diſtributed amongſt the inhabitants of the latter pariſh; would the whole profits be ſtill rateable in *A.*?] The water would be rateable where it was firſt brought under the excluſive dominion of the owner, and gathered, as it were, by art and labour from the natural ſoil into reſervoirs, &c. [*Bayley* J. Suppoſe the corporation rented a reſervoir in one pariſh and a pipe-way in another, would not each be rateable in its proper pariſh?] The reſervoir and the pipe would not be rateable in the hands of the corporation, any more than the occupier of a way-leave, who has been held not to be

(*a*) *Cald.* 357.

rateable

rateable for ſuch way-leave (*a*); for it would be rather a charge than a profit. Now the only eſtate this corporation occupy is in *Lyncomb* and *Widcomb*: they have only a liberty to lay pipes in the other pariſhes, but no poſſeſſion of the ſoil through which they paſs. In *The King* v. *The Mayor*, &c. *of London* (*b*), the *bargeway*, in reſpect of which the corporation were held liable to be rated for the proportion of the tolls which became due within the hamlet of *Hamptonwick* through which it led, was no other, as Lord *Kenyon* ſaid, than *the cloſe of land* called *the Bargeway*. In *Atkins* v. *Davis*, though the Judges of this Court differed in opinion as to the rateability of the waterworks, there was no difference as to the point of their being rateable, if at all, in the ſame pariſh.

Lens Serjt., *A. Moore*, and *Horner*, contrà, contended that the property was not rateable at all; and if it were, that it was not rateable to the extent of the rate in queſtion in the pariſh of *Lyncomb* and *Widcomb*. Firſt, the caſe of *Atkins* v. *Davis* is no authority for the rateability of this ſpecies of profit to the relief of the poor, within the meaning of the ſtat. 43 *Eliz*. *c*. 2.; for that was the caſe of a rate levied under the authority of the riot act 1 *G*. 1. referring to and adopting the principle and mode of levying given by the ſtat. 27 *Eliz*. *c*. 13., the Hue-and-Cry act, which directs the juſtices to tax all towns, &c. towards an equal contribution; and that after ſuch taxation made, the conſtables, &c. in each diviſion "ſhall tax, *according to their abilities*, every inhabitant and dweller in every ſuch town, &c., towards the pay-

(*a*) *Rex* v. *Joliffe*, 2 *Term Rep*. 90. The only point there decided was that the party rated, having a mere liberty of paſſage, was not rateable: the Court reſerved giving any opinion whether the occupier of the land, making ſuch a profit of it, was rateable; and this was obſerved by *Bayley* J. at the concluſion of this caſe.

(*b*) 4 *Term Rep*. 21.

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ment of such assessment." Whereas the stat. 43 *Eliz.* *c.* 2., on which this rate is founded, specifies certain subject matters of rating, namely, "lands, houses, tithes, coal-mines, and saleable underwoods," in respect of which the occupiers are to be rated: and Lord *Loughborough* (*a*), in giving the judgment of the court of Exchequer Chamber, in *Atkins* v. *Davis*, so far from thinking that the construction put upon the stat. 43 *Eliz.* would govern that of the 27th *Eliz.* that he rather excludes any analogy between them, either in spirit or letter. And every thing which was said as to the entirety of the rate upon the profits in the particular district was extrajudicial; inasmuch as it was enough to sustain the distress for the rate in the action of trespass against the constables, that there was any rateable property within the district. The same question has been often agitated since, and has been decided in different ways with respect to canals; but at last the rule seems to have been settled in *The King* v. *Page* (*b*), and other cases, that the profits are rateable in the parishes where they respectively become due. This is not like the case of a farm or garden, the produce of which is sent to market in another parish. Real property is necessarily rateable in the place where it lies, by the words of the stat. 43 *Eliz.*; but this is property sui generis, not within any of the terms of that statute: it is more like an easement: the corporation have no other use of the soil than merely to collect the water upon it before it is distributed, and the reservoir is no further distinguishable from the pipes than as being larger: when the whole is shut up it is no more than a system of ma-

(*a*) *Cald.* 327.

(*b*) 4 *Term Rep.* 543. And vide *Rex* v. *The Staffordshire and Worcestershire Canal Company*, 8 *Term Rep.* 340., and *Rex* v. *The Leeds and Liverpool Canal Company*, 5 *East*, 325.

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chinery consisting of one long trunk, with its terminating branches containing a quantity of water, and lying in different parishes; and the pipes in the one case, though covered with the soil in order to protect them from injury, are as much *visible property* in the respective parishes where they are laid, in the true sense of the term, as the reservoir, supposing the subject matter itself to be rateable. Indeed the most meritorious parts of the machinery for the production of the profits may be said to be the pipes, which convey the water from the spot, where it is of little or no value, to the places where it is delivered, and becomes valuable on account of the profit there derived from it. It is not pretended that the *pipes*, as such, are rateable within the 43 *Eliz.*: then how is the *reservoir*, as such, more rateable? The term *inhabitants*, spoken of in the statute as liable to be rated, means *resident* inhabitants within the parish, as is now settled by several late cases (*a*) in this court. The corporation therefore, who had no officer residing on the property, are not within the description. But it is attempted to bring them within the description of occupiers of *lands* or *houses*. But the reservoir, though in the shape of a building, is certainly no *house* within the plain meaning of that word in the statute: their officer has no residence there, nor was it ever used as such. Neither is it *land*: the local act does not give it to the corporation as *land*; they have only the privilege of excavating the ground, and excluding the soil, of erecting conduits, &c., and of laying their pipes under ground for the purpose of supplying the inhabitants of *Bath*, &c. with water. [Lord *Ellenborough* C. J. They must have

(*a*) *Rex* v. *Nicholson*, 12 *East*, 330. *Williams* v. *Jones*, *ib.* 346.; and *Rex* v. *The Bishop of Rochester and Others*, *ib.* 353. were cited.

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an intereſt in the land on which the reſervoir is made: the building itſelf muſt be upon the land.] Then the ſame conſideration muſt apply to the pipes which ſupply the water, and which are laid into the ſoil: and there will be no difficulty in apportioning the rate, between the pariſh where the water is firſt collected, and the pariſhes where it is afterwards diſtributed and the benefit received. [Lord *Ellenborough* C. J. I confeſs I have great difficulty in diſtinguiſhing between the caſe of water collected in a trunk or reſervoir ſo many yards wide, or in pipes ſo many inches wide, each being attached to the ſoil.] The reſervoir is no more than a large pipe. The water as ſoon as it is ſeparated from the land is only perſonal property. [*Bayley* J. The reſervoir with the water in it would all deſcend to the heir.] The water would follow the reſervoir, as an acceſſary does the principal: but an ejectment (*a*) would not lie for a ſpring of water, as ſuch: no præcipe would lie for water (*b*): a grant of water would not carry the ſoil, but the grant ſhould be of the ſoil covered with water: there can be no property in running water till it is reduced into poſſeſſion. It is however the water alone which yields the profit in this caſe; for the reſervoir and the pipes are in themſelves burthenſome inſtead of profitable.

The Court ſeemed to entertain no doubt, at the concluſion of the argument on a former day of the term, that the property in queſtion was rateable as land; but ſaid they would look into the caſes before they delivered their final opinion. And now

(*a*) Vide *Challenor* v. *Thomas*, *Yelv.* 143. *Brownl.* 142. and *Popb.* 167.
(*b*) *Co. Litt.* 4.

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Lord ELLENBOROUGH C. J. (After ſtating the caſe.) The mayor, aldermen, and citizens of *Bath* muſt be rated under the ſtat. 43 *Eliz.*, if at all, for the deſcription of property within mentioned, either in the character of *inhabitants* of the pariſh of *Lyncomb* and *Widcomb*, or as the *occupiers* of ſome of the different kinds of property particularly ſpecified in the act as the ſubjects of rate. Under various late deciſions, and particularly that of the *King* v. *Nicholſon*, 12 *Eaſt* 230, in which the ſeveral caſes on the ſubject are referred to, and which have been again cited on the preſent argument, it has been eſtabliſhed as the ſound conſtruction of the ſtatute 43 *Eliz.* that the word *inhabitants* in *that act* is only ſatisfied by a reſidence within the pariſh. And as there is no doubt that the corporation of *Bath* are not reſidents, they cannot be charged eo nomine, as *inhabitants*, in this caſe; and therefore, if rateable at all, muſt be rated as the *occupiers* of ſome of the ſeveral deſcriptions of property enumerated in the act. That they are *occupiers* of the *reſervoirs*, which they are empowered to make, and in which the water, which they are alſo authorized to collect, is kept; and that ſuch *reſervoirs* and *the water kept therein* are comprehended within the legal deſcription of *land*, (one of the deſcriptions of rateable property mentioned in the ſtat. 43 *Eliz.*) will not admit of a doubt: and it is equally unqueſtionable, that they conſtitute local and viſible property in the pariſh of *Lyncomb* and *Widcomb*, where they are ſituate. This diſpoſes of the firſt queſtion ſubmitted to our opinion; viz. whether the corporation is liable to be rated at all for their property in the pariſh of *Lyncomb* and *Widcomb*, where the land lies in which the ſprings and reſervoirs

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are ſituate. As to the ſecond queſtion, Whether the corporation is liable to be rated in this pariſh for *the whole* of the profits of the water which flows from the ſprings and reſervoirs, or only for the profits collected in this particular pariſh? It ſhould ſeem to follow as a conſequence from what has been ſaid already, that if the corporation of *Bath* be occupiers of any local viſible property, producing profit in any other pariſh, and falling by reaſonable conſtruction within the ſame deſcription of property as the reſervoirs already mentioned, they ſhould be liable in like manner to be rated for it, pro tanto, in ſuch other pariſh. The water is ſtated to be conveyed from the reſervoirs in *Lyncomb* and *Widcomb*, over the river *Avon*, and thence diſtributed into and through the ſeveral pariſhes in the city of *Bath*, and conducted to the houſes of the inhabitants there by means of main pipes and ſmaller pipes derived from theſe reſervoirs, and for which the occupiers of the ſeveral houſes in theſe pariſhes in *Bath* which are ſo ſupplied, pay a water-rent to the corporation. As ſo large a portion of the apparatus by the aid of which the water is conveyed along the two ſeveral pariſhes in *Bath*, and the ſoil itſelf within theſe pariſhes on which theſe pipes reſt, and on which ſoil the corporation are certainly under the powers of this ſpecial act authorized to lay them, muſt be conſidered as mainly conducive to the acquiring the water rent, which in ſo large a proportion, (namely 11 to 12 or 550*l.* out of 600*l.*) is received for the uſe of it in the two *Bath* pariſhes, it is impoſſible to ſay that the corporation ought to be rated as they are, that is, for the whole of ſuch profits in the pariſh of *Lyncomb* and *Widcomb* alone; and if they

they ought not to have been ſo rated, the rate appealed againſt muſt be quaſhed. A great deal of ſtreſs has been laid in the argument of this caſe, on the part of the reſpondents, on the ſuppoſed authority of the caſe of *Atkins and Others* v. *Davis and Others*, reported in *Cald.* 313; but as the judges of the court of *K. B.* were equally divided, no deciſion which can be relied on as authority was come to in this court. And although it may be collected from Lord *Loughborough*'s judgment in the Exchequer Chamber, that he thought that "the "*proper place* where the value of the whole is to be "taken is the *fountain head*, from which the whole is to "be diſtributed;" thereby intimating two things; firſt, that the whole profit ſhould be aſſeſſed at *one* place, and ſecondly, that ſuch one place ſhould be *the fountain head*: yet he adds, "however it is not very material to conſider that; for upon the preſent action it is certainly ſufficient to warrant the levying the diſtreſs, that here was a foundation to make a rate, and *ſome property* rateable." And indeed upon that ground, viz. of the form of the action, which aſſumed the diſtreſs to be illegal in toto, and upon the difference which is to be found in the language of the ſtats. 27 and the 43 *Eliz.* did the united judgment of the court of Exchequer Chamber proceed, and not upon the ſuppoſed rateability of the whole profits at the fountain head. In order to decide the queſtions reſerved for our determination upon this caſe, it is by no means neceſſary or proper for us to pronounce in what pariſhes beſides that of *Lyncomb* and *Widcomb*, and in what proportions the corporation ſhall be in future charged: indeed we have no adequate materials before us for ſuch a deciſion: it is enough upon the pre-

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sent occasion to state that the rate in question, by which the corporation has been charged for the *whole* of their profits in that *one* parish, is on that account bad, and must be quashed.

Thursday, Nov. 28th.

DENISON and Others *against* MAIR.

In covenant upon a deed of indemnity, whereby the plaintiffs covenanted to indemnify the Bank of *England* against advances to *L.* and *B.* on bills of exchange, to the amount of 100,000*l.*, and the defendant and others agreed to sub-indemnify the plaintiffs to the same amount in certain aliquot proportions, of which the defendant's proportion was 5000*l.*; and the plaintiffs alleged that they had been obliged to pay the whole 100,000*l.* to the Bank, and demanded of the defendant his proportion of 5000*l.*; in which action the plaintiffs had judgment upon demurrer; the Court refused to refer it to the Master to compute the principal and interest due on the deed; considering that it was not a mere question of computation of principal and interest, but that it was open to the defendant before the sheriff's jury to enter into questions of collateral satisfaction of the plaintiffs' demand from securities and effects of *L.* and *B.*, the principals, in their hands.

THIS case arose upon the same covenant as was before stated in the case of *Denison* v. *Richardson* (*a*); (this defendant being another of the sub-contracting parties of the third part in the deed of covenant for indemnifying the plaintiffs, who had indemnified the bank for their advances to *Lowndes* and *Bateson*, and having set down 5000*l.* opposite to his name in the schedule;) and came on upon a rule to shew cause why it should not be referred to the Master to see what was due for principal and interest on the deed of covenant, upon which this action was brought; and also to tax the plaintiffs' costs; and why the plaintiffs should not be at liberty to sign final judgment thereon, without executing a writ of inquiry of damages. This was founded upon an affidavit that the action was brought to recover 5000*l.* due from the defendant upon the deed, wherein the defendant severally covenanted with the plaintiffs to indemnify them to that extent against all demands, &c. of the Bank of *England*, on account of bills to the amount of 100,000*l.*, and interest, discounted

(*a*) Ante, 291.

by

by them, and to which the plaintiffs had become parties, and which sum of 100,000*l.* the plaintiffs had been called upon and obliged to pay, and had paid to the bank in pursuance of the said deed. That neither the defendant, nor any other person for or on his account, had paid to the plaintiffs the said 5000*l.*, or any part thereof. And that judgment was given on the 15th of *November* instant for the plaintiffs against the defendant, on a demurrer to the declaration.

The defendant's affidavit stated in answer, that the deed in question contained a covenant by *Lowndes* and *Bateson* to the other parties thereto to provide for, pay, and discharge out of their (*L.* and *B.*'s) own money the several bills of exchange to be drawn, accepted, or indorsed by the plaintiffs, in the manner stated, when and as they became due, and to indemnify the plaintiffs from all payments to the Bank or others thereupon; and also to indemnify the defendant, and the other parties of the third part, from all loss and demands, &c. on account of their engagements respecting the same. And further, that in order to indemnify the plaintiffs, and to provide money for taking up and discharging the several bills mentioned to the amount of 100,000*l.*, *Lowndes* and *Bateson* did, subsequent to the deed of covenant, *deliver to the plaintiffs or some of them, or to some person on their behalf*, divers bills of exchange, promissory notes, and other securities, and also divers goods and other effects to a very great amount; *some part of which* the plaintiffs, or some of them, or some person on their behalf, have received and sold; *and other part of which* the plaintiffs, or some person on their behalf, have now in their possession, *as the defendant believes*; and that the

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defendant was advifed and believes, that fuch bills of exchange, &c. and other effects, ought to be applied in part difcharge of the defendant's covenant for which the action is brought.

Park, *Littledale*, and *J. Clarke* now refifted the rule, as a novel attempt not warranted by former precedents, which have been confined to cafes where the amount of the damages has depended upon a mere calculation of figures. Whereas here, though the defendant's indemnity could not be extended beyond, yet it might fall fhort of 5000*l.*; and within that amount the damages are uncertain. It is in effect no more than an action for money paid to the ufe of another, for which the defendant is guarantee. It would be competent to the defendant to fhew before the fheriff's jury that the plaintiffs had not been damnified to the full extent, or at leaft that they had fince received part payment from the principals; and as intereft is not contracted in terms to be paid, it would reft with the jury whether or not they chofe to give it. Where a penalty is referved, the ftat. 8 & 9 *W.* 3. *c.* 11. directs that the jury fhall affefs the damages; and this is the fame thing in effect. The cafes on this point are collected in Mr. Serjt. *Williams*'s note to *Holdipp* v. *Otway* (*a*), and the authority moft in favour of the application is what is faid by *Buller* J. in *Thelluffon* v. *Fletcher* (*b*), that writs of inquiry are often fued out in cafes where they are not neceffary; as for inftance, in actions on covenants for the payment of a fum certain: for which he cited *Holdipp* v. *Otway*. But that was debt upon a bill obligatory for a certain fum:

(*a*) 2 *Saund.* 107. (*b*) *Dougl.* 316.

and

and in *Thellusson* v. *Fletcher*, which was upon a policy of insurance, a writ of inquiry had been executed. There are indeed three cases in covenant where similar motions have been granted: *Berthen* v. *Street* (*a*), where it was referred to the Master to compute principal and interest on a mortgage; and *Byron* v. *Johnson* (*b*), to compute what was due for rent; the only breach assigned being for non-payment of rent; and *Meggison* v. ——— (*c*), on an award: in all these the debt was certain, and was not liable to be varied in amount otherwise than by part payments. But a similar motion was denied in *Messin* v. *Lord Massareene* (*d*); which was assumpsit on a foreign judgment, into the consideration of which the defendant might enter; and in *Maunsell* v. *Lord Massareene* (*e*), which was upon a bill of exchange for 200*l*. *Irish*, the value of which varied with the exchange; and in *Palin* v. *Nicholson* (*f*), in an action on a bottomree bond. Even in the case of a common bill of exchange, the Court refused to refer it to the officer to compute *charges and expences* (*g*); or even *interest* on a *judgment* obtained on a bill of exchange (*h*).

The Attorney-General, *Barrow*, and *Taddy*, contrà, insisted that this application was supported by the precedents and in principle, there being a sum certain to be recovered, and therefore needing no writ of inquiry to inform the conscience of the Court, which was only sought for delay. This case in no respect differs from the common practice with respect to promissory notes and bills of exchange.

(*a*) 8 *Term Rep*. 326. (*b*) *Ib*. 410.
(*c*) *H*. 37 *G*. 3. *Tidd's Prac*. 516. 3d edit.
(*d*) 4 *Term Rep* 493. (*e*) 5 *Term Rep*. 87.
(*f*) *E*. 38 *G*. 3. *Tidd's Prac*. *chap*. 22.
(*g*) *Goldsmid* v. *Taite*, 2 *Bos*. & *Pull*. 55.
(*h*) *Nelson* v. *Sheridan*, 8 *Term Rep*. 395.

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[*Le Blanc* J. How does it appear that neither more nor less than 5000*l.* can be due to the plaintiffs upon this instrument?] The plaintiffs allege that they have paid to the Bank the entire sum of 100,000*l.*, of which the 5000*l.* agreed to be paid by the defendant in that event is an aliquot proportion: and the defendant has not put that fact in issue. Then supposing it to be true, as the defendant insists, that *Lowndes* and *Bateson*, the principals, have made deposits with the plaintiffs, which may eventually reduce the balance; it would not be competent to the defendant to enter into that account before the sheriff upon a writ of inquiry; but that would be a subject matter for the cognizance of a court of equity. At law the defendant is answerable to the plaintiffs for the whole sum which they have been obliged to pay to the Bank. If what has taken place operated as a full or part payment, or might have been set off to the demand in this action, the defendant should have pleaded or given notice of it. But the fact itself is only suggested upon *belief.* There is therefore nothing to inquire of in this case but the amount of principal and interest: and even if there have been any partial payment made to cut down the amount, it is no more than what the Master may compute, as in cases of bills of exchange, or mortgage deeds, in which latter case there are frequently collateral securities for payment of the principal. [*Bayley* J. having observed that there was no stipulation in the deed to pay interest; they answered that it was often the same in bills of exchange and promissory notes: but Lord *Ellenborough* C. J. said, that the course of dealing in the mercantile world was so universal to allow interest on such instruments, that it might be considered as in the contemplation of the parties at the time.] This is an

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advance of money for another, which always carries interest.

Lord ELLENBOROUGH C. J. If we were to make this rule absolute, we should be going further than it has been the practice of the Court to do upon applications of this kind. The Court are called upon to say what damages are due to these plaintiffs for the breach of the defendant's covenant of indemnity; and they have always been in the course of delegating such an inquiry to a jury, except in certain cases where the demand being in its nature certain, it is perfectly clear to the Court what the damages must be; and in those cases they will, on the application of the plaintiff after interlocutory judgment, delegate the function to their own officer of computing principal and interest. It was so done in the case of *Holdipp* v. *Otway*; and since that time the practice has become frequent in cases of bills of exchange and promissory notes, where a sum certain is to be recovered. So in the case of mortgages, the Master has been in the practice of taking the account of payments in satisfaction by the mortgagor, against the claim of principal and interest reserved by the mortgage deed; and possibly he may have inquired in some cases into collateral satisfaction from other sources; though that may perhaps be doubtful if the question comes to be considered. But in this case much collateral inquiry may be gone into before a jury, as to what satisfaction the plaintiffs may have received from collateral sources; and it is not confined to a mere computation of principal and interest. It would be a great innovation upon our general practice, and would be attended with some inconve-

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nience, to ſend ſuch an inquiry to the Maſter. I hold this opinion notwithſtanding I am ſatisfied that the true motive of the defendant in reſiſting the application is for delay: but I cannot, in order to defeat that purpoſe, overleap the bounds which the Court has wiſely ſet to itſelf for adminiſtering juſtice upon theſe occaſions.

Per Curiam, Rule diſcharged.

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for the truſtee, from time to time, out of the rents, &c, or by demiſe, mortgage, or ſale, &c, *to raiſe and pay the grantee* the arrears and charges, and to permit the wife to take the reſidue, &c. It ſeems that a memorial of ſuch deed inrolled, ſtating at firſt that *E. B.* was a truſtee nominated and appointed on behalf of the *grantee;* and after ſtating the grant of the annuity, "*with the uſual powers of diſtreſs and entry,*" (not ſtating particularly what thoſe powers were as applicable to the truſts of the term,) proceeding to ſtate the demiſe of the term by the huſband and wife to the truſtee, *in truſt* to permit the wife to receive and take the rents, &c., *until default* made in payment of the annuity, &c., and *in caſe of any ſuch default,* then *in truſt for ſecuring the due payment of the annuity and coſts,* &c. is not a valid memorial, inaſmuch as it omits to ſtate for whom *E. B.* was a truſtee *during the 20 days after the annuity ſhould be in arrear* till the expiration of which time he was not a truſtee for ſecuring the due payment of it. *Bradford* v. *Burland, M.* 52 *G.* 3. 445

Quære, whether a fine, if levied before the memorial inrolled, is an *aſſurance,* within the meaning of the annuity act, 17 *G.* 3. *c.* 26., required to be memorialized. *ibid*

ARREST.

1. See *Privilege of Parliament,* for the breach of which the Speaker of the Houſe of Commons may iſſue his warrant to the proper officer, under which, if the party refuſe to open his door and admit the officer, after demand made and notification of his buſineſs, the officer may break into the houſe, as he may in all caſes of executing proceſs of contempt iſſued by courts of juſtice. See further *Burdett* v. *Abbott, E.* 51 *G.* 3. 154, &c.
2. The officer charged with making ſuch arreſt may, if he find it neceſſary to the execution of his warrant, and to prevent perſonal danger to himſelf and his ordinary aſſiſtants, from a mob aſſembled in extraordinary numbers, and with a ſhew of force to overawe the civil power, call in the aſſiſtance of the military. *ibid.*
3. And evidence of acts of violence of the mob committed in parts adjacent, though out of view and hearing of the plaintiff in his houſe, appearing to be connected with the ſame purpoſe, is admiſſible to ſhew the danger and difficulty of executing the warrant by force againſt the plaintiff in his own houſe, without the aid and protection of the military, *ibid.* 183
4. An allegation that the plaintiff was "*arreſted* under and by virtue of the plaint," (i. e. in the ſheriff's court of *London,*) is proved by ſhewing the plaint entered, and the ſubſequent arreſt; though it alſo appeared that the officer making the arreſt firſt received a paper in the nature of a warrant, (but which was no warrant, but only the parol direction of the ſheriff, which is good by the cuſtom, reduced into writing to avoid miſtake,) directing him to make the arreſt; and though the ſt. 12 *G.* 1. *c.* 29. requires a previous affidavit of the debt, which had been made in this caſe. *Arundell* v. *White, T.* 51 *G.* 3. 216

ASSUMPSIT.

1. Proof of the execution of a bill of ſale of a ſhip to the defendant is not evidence to charge him as an owner with ſtores furniſhed to the ſhip, without ſhewing his aſſent to ſuch ſale. Neither is the regiſter of the ſhip, naming him as a part-owner, made by and upon the oaths of others,

others, primâ facie evidence to charge him as owner, without his assent or adoption. *Tinkler* v. *Walpole*, *T.* 51 *G.* 3. 226

2. A tradesman at one port receiving an order to forward goods to a person at another port, by a common sea carrier, does not sufficiently perform the order by depositing the goods at the receiving-house of such carrier, with directions to be forwarded to their place of destination, if the goods, being much above the value of 5*l.*, to which the carrier's liability was notoriously limited, be not specially entered and paid for accordingly: for such tradesman has an implied authority, and it is his duty, to pay any extra charge necessary to insure the responsibility of the carrier to the party from whom he received the order, though only general in the terms of it: and in case of non-delivery by the carrier, whose responsibility was lost for want of such special entry and payment, the tradesman cannot recover the value of the goods against the person from whom he received the order. *Clarke* v. *Hutchins*, *M.* 52 *G.* 3. 475

3. Indebitatus Assumpsit lies to recover del credere commissions for guarantying sums insured upon policies; such commissions being due upon entering into the contract of guarantie. And after judgment by default, the defendants cannot be allowed on a writ of inquiry to set off, in reduction of damages, the amount of losses not indemnified. *Caruthers and Another* v. *Graham and Another*, *M.* 52 *G.* 3. 578

4. *Kelly* residing abroad having remitted bills on *England* to the defendants, his bankers in *London*, with directions in the letters inclosing such bills to pay the amount in certain specified proportions to the plaintiff and other creditors of *Kelly*, who would produce their letters of advice from him on the subject; and desiring the amount paid to each person to be put on the back of their respective bills; and that every bill paid off should be cancelled; and the plaintiff having before the bills became due given notice to the defendants that he had received a letter from *Kelly* ordering payment of his debt out of that remittance, and having offered them an indemnity if they would hand over one of the bills to him; but the defendants *refused to indorse the bill away, or to act upon the letter;* admitting, however, that they had received the directions to apply the money: and in fact the defendants did afterwards receive the money on the bills when due: held that they did not by the mere act of receiving the bills, and afterwards the produce of them, with such directions, and without any assent on their part to the purposes of the letter, and still more against their express dissent, bind themselves to the plaintiff so to apply the money in discharge of his debt due to him from *Kelly*; and consequently that the plaintiff, (between whom and the defendant there was no privity of contract express or implied, but on the contrary it was repudiated,) could not maintain an action against the defendants as for money had and received by them to his use. But that the property in the bills and their produce still continued in the remitter. *Williams* v. *Everett and Others*, *M.* 52 *G.* 3. 582

5. But money paid into a banking-house for the purpose of taking up a particular bill, which was lying there for payment; though the banker's clerk said at the time that he could not give up the bill till he had seen his master; was held to be money had and received to the use of the then owner and holder of the bill; and could not be applied

2. A

4. The Court would not direct a writ of inquiry to be executed upon judgment by default in an action of debt; but referred it to the master to ascertain what was due, upon the application of the defendant and after execution executed. *Taylor* v. *Capper*, *T.* 51 *G.* 3. 442

5. A bankrupt, who has been waived (or outlawed) and her person arrested and goods taken by the sheriff, under a writ of capias utlagatam, is not entitled to be relieved on summary motion from such arrest and levy, except upon the terms of appearing to the action and putting in and perfecting special bail; although the plaintiff had also proved her debt under the commission, and received a dividend; after which this action was commenced for the balance. *Summervil* v. *Isabella Watkins and Others*, *M.* 52 *G.* 3. 536

6. An intervening *Sunday* is to be reckoned as one of the eight days in full term given to bail to render their principal after the return of the writ. *Creswell* v. *Green*, *M.* 52 *G.* 3. 537

7. The bail are entitled to be discharged upon their bankrupt principal's obtaining his certificate before the time allowed to them by the indulgence of the Court for rendering their principal is out; *i. e.* before the appearance day of the last scire facias. But the bail not having applied in time to enter an exonereter on the bail piece, till after the money levied upon them, they can only be relieved on payment of costs. *Mannin* v. *Partridge and Another, bail of Goodshall*, *M.* 52 *G.* 3. 599

8. If the attorney employed to prepare a warrant of attorney to confess judgment, which is to be made subject to a defeazance, neglect to insert such defeazance on the warrant, which is required by rule of Court of *Michaelmas*, 42 *G.* 3. the security is not thereby avoided against the innocent party, but the attorney is guilty of a breach of duty imposed on him by the Court, and answerable for it on motion. *Shaw* v. *Evans*, *M.* 52 *G.* 3. 576

9. In covenant upon a deed of indemnity, whereby the plaintiffs covenanted to indemnify the Bank of *England* against advances to *L.* and *B.* on bills of exchange to the amount of 100,000*l.*, and the defendant and others agreed to subindemnify the plaintiffs to the same amount in certain aliquot proportions, of which the defendant's proportion was 5000*l.*; and the plaintiffs alleged that they had been obliged to pay the whole 100,000*l.* to the Bank, and demanded of the defendant his proportion of 5000*l.*, in which action the plaintiffs had judgment upon demurrer; the Court refused to refer it to the Master to compute the principal and interest due on the deed; considering that it was not a mere question of computation of principal and interest, but that it was open to the defendant before the sheriff's jury to enter into questions of collateral satisfaction of the plaintiffs' demand from securities and effects of *L.* and *B.*, the principals, in their hands. *Denison and Others* v. *Mair*, *M.* 52 *G.* 3. 622

PRESSING.

It does not appear that the master of any vessel is merely, as such, exempted by law from being impressed; and where it appeared to the Court that a person, whose father was stated to be acting as mate on board a coasting vessel of 52 tons, had been just before appointed to act as master, upon a supposition that he would be thereby exempted from being impressed, the

the Court refused even a rule to shew cause why he should not be brought up by habeas corpus to be discharged from on board a king's ship, where he was placed after having been impressed. *Anthony Barrow's Case*, *T.* 51 *G.* 3. 346

PRINCIPAL AND SURETIES.

A bond for the collection and payment over of public duties may be put in force against one of the sureties, though he were not apprized of the default of the principal collector in not paying over the duties collected by him, nor called upon for an indemnity by the commissioners till after the dismissal from office of such collector. *Nares and Pepys* v. *Rowles*, *M.* 52 G. 3. 510

PRIVILEGE OF PARLIAMENT.

1. To an action of trespass against the Speaker of the House of Commons for forcibly, and with the assistance of armed soldiers, breaking into the messuage of the plaintiff, (the outer door being shut and fastened,) and arresting him there, and taking him to the Tower of *London*, and imprisoning him there; it is a legal justification and bar to plead that a parliament was held, which was sitting during the period of the trespasses complained of; that the plaintiff was a member of the House of Commons; and that the house having resolved, "that a certain letter, &c. in *Cobbett's Weekly Register*, was a libellous and scandalous paper, reflecting on the just rights and privileges of the house; and that the plaintiff, who had admitted that the said letter, &c was printed by his authority, had been *thereby* guilty of a breach of the privileges of that house;" and having ordered that for his said offence he should be committed to the Tower, and that the Speaker should issue his warrant accordingly; the defendant, as Speaker, in execution of the said order, issued his warrant to the Serjeant at Arms, to whom the execution of such warrant belonged, to arrest the plaintiff, and commit him to the custody of the Lieutenant of the Tower; and issued another warrant to the Lieutenant of the Tower, to receive and detain the plaintiff in custody during the pleasure of the house; by virtue of which first warrant the Serjeant at Arms went to the messuage of the plaintiff, where he then was, to execute it; and because the outer door was fastened, and he could not enter, after audible notification of his purpose, and demand made of admission, he, by the assistance of the said soldiers, broke and entered the plaintiff's messuage, and arrested and conveyed him to the Tower, where he was received and detained in custody, under the other warrant, by the Lieutenant of the Tower. *Sir Francis Burdett, Bart.* v. *The Right Honourable Charles Abbot, Speaker of the House of Commons, E.* 51 *G.* 3. 1

2. The Serjeant at Arms of the House of Commons, being charged with the execution of the Speaker's warrant for arresting and conveying to the Tower the plaintiff, a member of the house, for a breach of privilege, is not guilty of any excess of authority in the execution of such warrant, so as to make him a trespasser ab initio, if, upon the refusal of the plaintiff to submit to the arrest, and his shutting the outer door against the Serjeant, who had demanded admission for the purpose, and declaring that the warrant was illegal, and that he would only submit to superior force; and a large mob having assembled before the plaintiff's house, and in the streets adjoining, so

ſo that the Serjeant could not arreſt and convey the plaintiff to the Tower, without danger to himſelf and his ordinary aſſiſtants, if at all, by the mere aid of the civil power; the Serjeant thereupon called in aid a large military force; and after breaking into the plaintiff's houſe, placed a competent number of the military therein for the purpoſe of ſecuring a ſafe and convenient paſſage to conduct the plaintiff out of the houſe into a carriage in waiting, and from thence conducted him with a large military eſcort to the Tower, uſing at the ſame time every perſonal curteſy to his priſoner conſiſtent with the due execution of his duty; which however will not admit of delay, (breeding hazard,) in the execution of ſuch warrant. *Sir Francis Burdett, Bart.* v. *Francis John Coleman, Eſq T.* 51 *G* 3. 163

3. See further, *Evidence*, 1.

PROCESS,

See Writs.

In treſpaſs againſt magiſtrates for an act done by them ex officio, the plaintiff muſt ſhew at niſi prius that he proceeded upon a writ ſued out within ſix months after notice to them of the action; although there be a continuing cauſe of action; and therefore the plaintiff muſt ſhew a return and continuance of the firſt writ, if the ſecond be out of the time fixed by the notice. *Weſton* v. *Fournier, M.* 52 *G.* 3. 491

PRIZE,

See Insurance, 7.

PROMISSORY NOTES,

See Bills of Exchange.

RATE.

See Poors Rates.

RECORD.

If the plaintiff in an action for a malicious proſecution offer to prove at the trial the original record of the indictment and acquittal, or a true copy thereof, ſuch evidence muſt be received, though there were no order of the Court or fiat of the Attorney-General allowing the plaintiff a copy of ſuch record; but the officer, who, without ſuch authority, produces the record or gives a copy of it to the party, is anſwerable for the contempt of Court in ſo doing; and the Judge at niſi prius would not compel him to produce the record in evidence, without ſuch authority. *Legatt* v. *Tollervey, T.* 51 *G.* 3. 302

REMITTANCE.

See Assumpsit, 4.

REMOVAL,

See Poor Removal.

REVERSION,

See Action on the Case, 2.

REVOCATION,

See Power, 1.

SACRAMENT,

See Corporation, 2.

SALE,

See Carrier. Vendor and Vendee.

SCIRE FACIAS,

See Pleading, 2.

SERVANTS,

See Master and Servant. Wages, Rate of.

SESSIONS,

See WAGES, RATE OF.

SET OFF.

Commiſſions del credere for guranty-ing ſums inſured upon policies are due upon entering into the contract of gurantie, and may be recovered in an action of indebitatus aſſumpſit; and after judgment by default, the defendant cannot ſet off in reduction of damages the amount of loſſes not indemnified. *Caruthers* v. *Graham*, *M.* 52 *G.* 3. 578

SETTLEMENT,

See POOR REMOVAL.

—— *By Apprenticeſhip.*

In order to prevent the ſettlement of an apprentice bound to a maſter who was reſiding in the pariſh under a certificate from a friendly ſociety, by virtue of the ſtat. 33 *G.* 3. *c.* 54. it is not ſufficient for the certificated pariſh merely to produce the certificate, upon appeal to the ſeſſions from an order of removal of the apprentice to ſuch pariſh, but they muſt alſo ſhew that ſuch certificate had been *delivered* to the pariſh officers, as mentioned in ſect. 17. of the act, before the ſervice of the apprentice. *The King* v. *The Inhabitants of Egremont*, *T.* 51 *G.* 3. 253

See SETTLEMENT —*by Hiring and Service*, 1.

SETTLEMENT — *by Hiring and Service.*

Three months after a pauper, under age, had hired himſelf generally to a brickmaker for a year, they entered into a written contract, unſtamped and without ſeals, whereby the pauper covenanted and agreed to ſerve his maſter for three years, to learn to make bricks, &c. on condition of his maſter finding him in board, lodging, and clothes, and for him to be decently clothed at the end of the three years, on condition of his attending the kiln at nights: held that this contract, (aſſuming that an infant might bind himſelf by any contract made for his benefit at the time, if legally framed,) was no proof of an apprenticeſhip in the contemplation of the parties, but only of a new hiring in the ſame relation of maſter and ſervant as the original hiring; only reſtraining the ſervice to ſuch employ of the maſter as would enable the boy to learn the trade; (for the maſter did not bind himſelf to teach him the trade.) But if the intention of the parties had appeared to be to contract for an apprenticeſhip, yet as ſuch contract was illegal and void in the form and manner of it, it would not have done away the original good contract of hiring and ſervice for a year; and therefore the ſervant would at any rate gain a ſettlement by ſerving his maſter for a year. *The King* v. *The Inhabitants of Shinfield*, *M.* 52 *G.* 3. 541

SETTLEMENT—*by taking a Tenement.*

Where the pauper applied to the owner of a farm for *the milking of a cow*, which it was agreed that he ſhould have *for the ſeaſon*, at 9*l.*; and the particular cow was then pointed out; though nothing was ſaid as to how or where the cow was to be fed, further than that he was then told that the owner's farming man would inform him *in what paſture the cow would be firſt milked;* of which he was afterwards informed; and ſo from time to time as the paſture was changed: held that this was ſufficient evidence of a contract for the taking of a *paſture-fed* cow, and by conſequence of a tenement within the ſtatute, ſo as to confer a ſettle-

settlement on the pauper, who rented another tenement at the same time of the annual value altogether of 10*l.* *The King* v. *The Inhabitants of Darley Abbey*, *T.* 51 *G.* 3. 280

SHERIFF.

If upon the execution of a writ of capias ad. satisfaciendum, which requires the sheriff to take and *keep the body*, so that he may have it on the return-day of the writ at *Westminster to satisfy the plaintiffs* of their damages, costs, and charges, the sheriff, before the return-day, receive the money due from his prisoner, and thereupon liberate him, before he has paid it over in satisfaction to the party entitled to it, he is answerable as for an escape: and his return under the common rule, of cepi corpus, and that he detained the prisoner until he satisfied *him* (the sheriff) the levy-money indorsed on the writ, which he had ready, as commanded, &c. is of no avail. *Slackford and Another, Executrix and Executor of Slackford*, v. *Austen, Sheriff of Surry*, *M.* 52 *G.* 3. 462

SHIP.

1. Proof of the execution of a bill of sale of a ship to the defendant is not evidence to charge him as an owner with stores furnished to the ship, without shewing his assent to such sale. Neither is the register of the ship, naming him as a part-owner, made by and upon the oaths of others, primâ facie evidence to charge him as owner, without his assent or adoption. *Tinkler* v. *Walpole*, *T.* 51 *G.* 3. 226
2. Ship documents, see *Insurance*, 1.

SOUTHWARK BOROUGH COURT.

1. Writs issued out of this court against persons within the borough of *Southwark* are to be directed to the sheriff of the county, who issues his mandate thereupon to the sheriff of the borough; and not to the bailiff in the first instance. *Bowring* v. *Pritchard*, *T.* 51 *G.* 3. *289
2. Where a demand for plumber's work, and new materials found, amounting in value to 8*l.*, was reduced below 5*l.* by the plaintiff's taking the old lead and allowing for it, instead of using it as far as it would go, in which case the original demand would have been under 5*l.*, the plaintiff is not entitled to his costs under the *Southwark* borough act, 46 *G.* 3. *c.* 87., and it is not a demand reduced below 5*l.* by balancing an account within the exception in the 12th section. *Porter* v. *Philpot*, *T.* 51 *G.* 3. 344

STATUTES.

A bond with a condition, reciting that the principal obligor, with his sureties, became bound as collector of certain duties assessed under the stat. 43 *G.* 3. (*c.* 122.) to the commissioners acting for the district under that statute, for the due collection and payment of those duties to the receiver-general, could not, it seems, be enforced if the statute referred to did not authorize the collection of those duties; though in fact the collector had received sums from the subjects as and for such duties. But that statute authorizing the duties to be assessed and collected "under the "regulations of any act *to be* passed "in the same session of parliament "for *consolidating certain of the pro-"visions contained in any act or acts "relating to the duties under the ma-"nagement of the commissioners for the "affairs of taxes*," &c. was held to speak the language of the legislature as from the commencement of, and with reference to, the whole session,

STOCKS,

See Indictment, 2.

STOPPING IN TRANSITU,

See Vendor and Vendee, 1.

SUMMONS.

The leaving with a woman at the defendant's house, whom the witness believed to be a menial servant of the defendant, a copy of the summons to appear and answer to the offence charged, (to which woman the

the original was also shewn,) is a sufficient summons within the stat. 32 *G.* 2. *c.* 17. *The King* v. *Chandler*, *T.* 51 *G.* 3. 267

SURETIES,

See Bond, 2.

TENANT,

See Landlord and Tenant.

TOLERATION ACT,

See Dissenters, 1.

TRADE,

See Insurance, 5.

TREES,

See Trespass, 2.

TRESPASS,

See Privilege.

1. The plaintiff's dogs having hunted and caught, on the defendant's land, a hare started on the land of another, the property is thereby vested in the plaintiff, who may maintain trespass against the defendant for afterwards taking away the hare. And so it would be though the hare, being quite spent, had been caught up by a labourer of the defendant *for the benefit of the hunters*. *Churchward* v. *Studdy*, *T.* 51 *G.* 3. 249

2. To an action of trespass for cutting down and converting trees, which the defendant justified as growing upon his soil and freehold, the plaintiff replied that the *trees* were his *freehold*, and not the freehold of the defendant: and this was held to be proved by shewing that they grew on a certain woody belt, 15 feet wide, which surrounded the plaintiff's land, but was undivided by any fences from the several closes adjoining, of which it formed part, belonging to different owners; and that from time to time the plaintiff and his ancestors, at their pleasure, cut down, for their own use, the trees growing within the belt, and that the several owners of the different closes inclosing the belt, never felled trees there, though they felled them in other parts of the same closes; and that when they made sale of their estates, the trees in the belt were never valued by their agents, because they were reputed and considered to belong to the plaintiff and his ancestors, in which the several owners acquiesced. *Sir Thomas Stanley*, *Bart.* v. *White*, *T.* 51 *G.* 3. 332

3. In trespass against magistrates for an act done by them ex officio, the plaintiff must shew at nisi prius that he proceeded upon a writ sued out within six months after notice to them of the action, although there be a continuing cause of action; and therefore the plaintiff must shew a return and continuance of the first writ, if the second be out of the time fixed by the notice. *Weston* v. *Fournier and Another*, *M.* 52 *G.* 3. 491

TROVER,

See Vendor and Vendee.

In trover for a bond, the plaintiff may give parol evidence of it to support the general description of the instrument in the declaration, without having given the defendant previous notice to produce it; as the nature of the action gives sufficient notice to the defendant of the subject of inquiry, to prepare himself to produce it, if necessary, for his defence. *How and Another*, *Executors of Nicholls*, v. *Hall*, *T.* 51 *G.* 3. 274

VENDOR AND VENDEE.

1. The defendants having sold a quantity of timber, then lying at their own wharf, to *D*, for bills payable at a future day; which timber was then marked by *D*., and a small part of it was forwarded by the defendants to one place, and part to another; and then *D*, before the time of payment arrived, sold the whole to the plaintiff, who notified such sale to the defendants, and was answered that it was *very well*; and then, in the presence of the defendants, the plaintiff marked all the timber lying at their wharf, and afterwards marked that which had been forwarded to the other two stages: held that the defendants, after such assent to the transfer, and such marking by the plaintiff, could not retain or stop any of the timber as in transitu upon the subsequent insolvency, before the day of payment, of *D*, the original vendee, to whom payment had been made by the plaintiff; whatever question there might have been as between the original vendors and vendee *Stoveld* v. *Hughes and Another*, *T*. 51 *G*. 3. 308

2. Under a contract to purchase 300 tons of *Campeachy* logwood, at 35*l* per ton, &c. to be of real merchantable quality; and such as might be determined to be otherwise by impartial judges, to be rejected; the vendee is bound to take so much of the wood tendered as turned out to be of the sort described, at the contract price; though it appeared at the time that a part, which was afterwards ascertained to be 16 out of the 300 tons, was of a different and inferior description. *Graham* v. *Jackson*, *M*. 52 *G*. 3. 498

WAGES, RATE OF.

The stat. 16 *Car*. 1. *c*. 4. *s*. 2 having continued the stat. 1 *Jac*. 1. *c*. 6. the 2d and 3d sections of which last mentioned statute, in extension of the stat. 5 *Eliz*. *c*. 4, authorizes the justices in sessions (with the sheriff, if he conveniently may) to rate the wages of *any labourers*, &c. *or workmen whatsoever*, &c; this Court granted a mandamus to the justices, &c. of *Kent*, to hear an application of the journeymen millers of that county, praying them to make such rate; which application the justices had refused to hear upon the merits; considering that they had no jurisdiction over other than the wages of servants in husbandry. *The King* v. *The Justices of Kent*, *T*. 51 *G*. 3. 395

WAIVER,

See Outlawry.

WARRANT,

See Arrest, 4 Privilege of Parliament.

WARRANT OF ATTORNEY.

If the attorney employed to prepare a warrant of attorney to confess judgment; which is to be made subject to a defeazance, neglect to insert such defeazance on the warrant, which is required by rule of Court of *M*. 42 *G*. 3., the security is not thereby avoided against the innocent party; but the attorney is guilty of a breach of duty imposed on him by the Court, and answerable for it on motion. *Shaw* v. *Evans*, *M*. 52 *G* 3. 576

WASTE,

See Action on the Case, 2.

WITNESS.

In an action by the obligees of a joint and several bond against one of the obligors, who was surety for another of them who had become bankrupt,

2. A bond with a condition, reciting that the principal obligor, with his sureties, became bound as collector of certain duties assessed under the stat. 43 *G.* 3 (*c.* 122.) to the commissioners acting for the district under that statute, for the due collection and payment of those duties to the receiver-general, could not, it seems, be enforced if the statute referred to did not authorize the collection of those duties, though in fact the collector had received sums from the subjects as and for such duties. But that statute authorizing the duties to be assessed and collected " under the regulations of any act " *to be* passed in the same session of " parliament for *consolidating certain* " *of the provisions contained in any* " *act or acts relating to the duties un-* " *der the management of the commis-* " *sioners for the affairs of taxes*," &c. was held to speak the language of the legislature as from the commencement of, and with reference to, the whole session, and to relate to a *prior* act, with the title referred to, passed in the same sessions, (*c.* 99.) and indorsed accordingly with a prior date, by virtue of the stat. 33 *G.* 2. *c.* 13.

And such bond may be put in force against one of the sureties, though he were not apprized of the default of the principal collector in not paying over duties collected by him, nor called upon for an indemnity by the commissioners, till after the dismissal from office of such collector. *Nares and Pepys* v. *Rowles*, *M.* 52 *G.* 3. 510

BRIDGE.

1. A canal company, authorized by an act of parliament to make the river *Bain* navigable, and to make and enlarge certain navigable cuts, and build bridges and other works connected with the navigation, having for their own benefit made a navigable cut and deepened a ford which crossed the highway, and thereby rendered a bridge necessary for the passage of the public, which was accordingly built at the expence of the company in the first instance, are bound to maintain the same; and the burthen of repair cannot be thrown upon the inhabitants of the (county) parts of *Lindsey*, in the county of *Lincoln*.

Note—The company were found to have profitable funds for the purpose. *The King* v. *The Inhabitants of the Parts of Lindsey, in the County of Lincoln*, *T.* 51 *G.* 3. 317

2. Though a charter of *Ed.* 6. granted upon the recited prayer of *the Inhabitants* of the borough of *Stratford-upon-Avon*, that the king would esteem them, the inhabitants, worthy to be *made, reduced, and erected* into a body " corporate and poli- " tic," and thereupon proceeding to " *grant* (without any word of " *confirmation*) unto the *inhabitants* " of the borough, that the same " borough should be a free borough " for ever thereafter;" and then proceeding to incorporate them by the name of the Bailiffs and Burgesses, &c. would, without more, imply a new incorporation: yet where the same charter recited that it was an *ancient borough*, in which a guild was theretofore founded and endowed with lands, *out of the rents, revenues, and profits* of which a *school* and an *alms-house* were maintained, and a *bridge* was *from time to time kept up and repaired;* which guild was then dissolved, and its lands lately come into the king's hands: and further reciting that *the inhabitants of the borough, from time immemorial,* had enjoyed *franchises, liberties,* free customs, *jurisdictions,* privileges, exemptions, and immunities, by reason and pretence of the guild, and of charters, grants, and confirmations

firmations to the guild, and otherwise, which the inhabitants could not then hold and enjoy by the dissolution of the guild and for other causes, by means whereof it was likely that the *borough* and its *government* would fall into a worse state without speedy remedy; and thereupon *the inhabitants of the borough* had prayed the king's favour for *bettering the borough and government* thereof, and *for supporting the great charges* which from time to time they were bound to sustain, to be deemed worthy to be made, &c. a body corporate, &c.: and thereupon the king, after granting to the inhabitants of the borough to be a corporation (as before stated), granted them the same *bounds and limits as the borough* and the *jurisdiction* thereof *from time immemorial* had extended to:

And then the king, "willing that the *alms house* and *school* should be kept up and maintained as theretofore, (without naming the *bridge*,) and that the *great charges to the borough and its inhabitants* from time to time *incident* might be thereafter *the better sustained and supported*, granted to the corporation the lands of the late guild:

And it further appearing by parol testimony, as far back as living memory went, that *the corporation* had always *repaired* the *bridge*:

Held, that taking the whole of the charter and the parol testimony together, the preponderance of the evidence was, first, that this was *a corporation by prescription*, though words of creation only were used in the incorporating part of the charter of *Ed.* 6th. 2dly, That the burden of repairing the bridge was upon such prescriptive corporation during the existence of the guild before that charter; though the guild, out of their revenues, had in fact repaired the bridge; which was only in case of the corporation, and not ratione tenuræ; and that the corporation were still bound *by prescription*, and not merely *by tenure*; and therefore that a verdict against them upon an indictment for the non-repair of the bridge, charging them as *immemorially* bound to the repair of it, was sustainable. *The King* v. *The Mayor, Aldermen, and Burgesses of the Borough of Stratford-upon-Avon*, *T.* 51 *G.* 3. 348

3. A new and substantive bridge of public utility, built within the limit of one county and adopted by the public, is repairable by the inhabitants of that county, although it be built within 300 feet of an old bridge repairable by the inhabitants of another county, who were bound in course under the st. 22 *H.* 8. *c.* 5. to maintain such 300 feet of road, though lying in the other county. *The King* v. *The Inhabitants of the County of Devon*, *M.* 52 *G.* 3. 477

CARRIER.

1. A tradesman at one port receiving an order to forward goods to a person at another port by a common sea-carrier, does not sufficiently perform the order by depositing the goods at the receiving-house of such carrier, with directions to be forwarded to their place of destination, if the goods, being much above the value of 5*l.*, to which the carrier's liability was notoriously limited, be not specifically entered and paid for accordingly; for such tradesman has an implied authority, and it is his duty, to pay any extra charge necessary to insure the responsibility of the carrier to the party from whom he received the order, though only general in the terms of it; and in case of non-delivery by the carrier, whose responsibility was lost for want of such special entry and payment, the

tradesman

tradesman cannot recover the value of the goods against the person from whom he received the order. *Clarke* v. *Hutchins*, *M.* 52 *G.* 3. 475

COIN,

See INDICTMENT, I.

COMBINATION,

See EVIDENCE, I.

COMMONS, HOUSE OF,

See PRIVILEGE.

CONDEMNATION,

See INSURANCE, I.

CONSPIRACY,

See EVIDENCE, I.

CONVICTION.

1. The stat. 15 *Car.* 2. *c.* 24. *s.* 15., giving summary jurisdiction in offences against the excise, committed within the limits of the chief office of excise in *London*, to the chief commissioners, &c.; and "within all "or any other the counties, cities, "&c. within this kingdom, &c. "to two or more *justices of the* "*peace residing near* to the place "where such offence shall be com-"mitted;" must be understood to be confined to justices of the peace *of the county*, &c. wherein the offence was committed: and therefore if a defendant be convicted by two resident justices of the peace upon the stat. 19 *G.* 3. *c.* 50. *s.* 2. for having in his custody and possession a private and concealed still for illicit distillation; and the evidence only shew that his *house* was in the county, and that the still was found concealed in *the garden of the said house*; such garden not appearing to be in the same county; the conviction is bad.

2dly, The leaving *with a woman at the defendant's house*, whom the witness *believed* to be a menial servant of the defendant, a *copy* of the summons to appear and answer to the offence charged, (to which woman the original was also shewn,) is a sufficient summons within the stat. 32 *G.* 3. *c.* 17.

3dly, The information, charging the defendant with having in his custody and possession certain private and concealed vessels for distillation, to wit, *one still, &c.*, one head, &c. (for each of which the offender is liable to a separate penalty;) and then alleging that he forfeited for *the said still one penalty*; and the justices, after proof of the *several offences* stated in the first part of the information under the videlicet, convicting the defendant in the *single* penalty prayed for "*for* "*his said offence mentioned in the said* "*information*;" such conviction was holden to be sufficiently certain and good.

4thly, The information, appearing to be laid more than 10 days after the offence charged and proved to be committed, is sufficient upon the stat. 19 *G.* 3. *c.* 50. *s.* 2.; without negativing that the owner had, within 10 days after the seizure, claimed the vessels seized.

5thly, Quære how far evidence that the still was found concealed in the garden of the defendant's house, apparently just worked off; but without proof that the defendant himself was in or near his house at the time; would warrant a conviction of him as having such illicit and concealed still *in his custody and possession*. *The King* v. *Chandler*, *T.* 51 *G.* 3. 267

2. Under the st. 20 *G.* 2. *c.* 19. *s.* 2. for regulating servants in husbandry, artificers, and other labourers there mentioned,

mentioned, if a justice of peace, upon a complaint made to him of the misconduct of such a person in his employment, sentence the offender to be committed to the house of correction for a time not exceeding one calendar month, he must, if he intend to proceed upon that statute, also sentence him *there to be corrected and held to hard labour:* but the statute gives the justice an option to punish the offender in that manner, or otherwise by abating part of his wages, or by discharging him from his employment. And the meaning of the terms "there *to* "*be corrected*" is to be understood of a correction by whipping. But this latter punishment cannot be inflicted upon the like offenders under the stat. 6 *G.* 3. *c.* 25. which enables the justice to commit the offender to the house of correction for any time not exceeding three months, nor less than one month; nor can the punishments inflicted by the two acts be blended. The *employer* of the servant is the master for whose service he is retained, and not the bailiff of the farm, who in fact hires the servant. *The King* v. *Hosceason*, *M.* 52 *G.* 3. 605

CORPORATION.

See INDICTMENT, 2.

1. Though a charter of *Ed.* 6th., granted upon the recited prayer of *the inhabitants* of the borough of *Stratford-upon-Avon*, "that the king "would esteem them *the inhabitants* "worthy to be *made, reduced, and* "*erected* into a body corporate and "politic," and thereupon proceeding to "*grant* (without any word "of *confirmation*) unto *the inhabit-* "*ants* of the borough, that the same "borough should be a free borough "for ever thereafter;" and then proceeding to incorporate them by the name of the Bailiffs and Burgesses, &c. would, without more, imply a new confirmation: yet where the same charter recited that it was an *ancient* borough, in which a guild was theretofore founded and endowed with lands, *out of the rents, revenues, and profits* of which a *school* and an *alms-house* were maintained, and *a bridge* was *from time to time kept up and repaired;* which guild was then dissolved, and its lands lately come into the king's hands: and further reciting that *the inhabitants of the borough*, *from time immemorial*, had enjoyed *franchises, liberties*, free customs, *jurisdictions*, privileges, exemptions, and immunities, by reason and pretence of the guild, and of charters, grants, and confirmations to the guild, *and otherwise*, which the inhabitants could not then hold and enjoy by the dissolution of the guild, and for other causes; by means whereof it was likely that *the borough* and its *government* would fall into a worse state without speedy remedy; and thereupon *the inhabitants of the borough* had prayed the king's favour *for bettering the borough and government thereof*, and *for supporting the great charges* which from time to time they were bound to sustain, to be deemed worthy to be made, &c. a body corporate, &c.: and thereupon the king, after granting to the inhabitants of the borough to be a corporation (as before stated), granted them the same *bounds and limits as the borough*, and *the jurisdiction thereof from time immemorial* had extended to:

And then the king, "willing that *the alms-house* and *school* should be kept up and maintained as theretofore (without naming the *bridge*), and that the *great charges to the borough and its inhabitants* from time to time *incident*, might be thereafter *the better sustained and supported*, granted

granted to the corporation the lands of the late guild:

And it further appearing by parol testimony, as far back as living memory went, that *the corporation* had always *repaired* the *bridge*:

Held that taking the whole of the charter and the parol testimony together, the preponderance of the evidence was, first, that this was *a corporation by prescription*, though words of creation only were used in the incorporating part of the charter of *Ed.* 6th. 2dly, That the burden of repairing the bridge was upon such prescriptive corporation during the existence of the guild before that charter; though the guild, out of their revenues, had in fact repaired the bridge; which was only in ease of the corporation, and not ratione tenuræ; and that the corporation were still bound *by prescription*, and not merely *by tenure*; and therefore that a verdict against them upon an indictment for the non-repair of the bridge, charging them as *immemorially* bound to the repair of it, was sustainable. *The King* v. *The Mayor, Aldermen, and Burgesses of the Borough of Stratford-upon-Avon*, *T.* 51 *G.* 3. 348

2. One who has not taken the sacrament according to the rites of the church of *England*, within a year before his election in fact to a corporate office, is disqualified by the corporation act, 13 *Car.* 2. *st.* 2. *c.* 1. *s.* 12. from being elected: and if such disqualification be notified to the electors at the time of election, votes afterwards given to such person are then thrown away; and any candidate having the most legal votes, though in fact inferior in number to the first, is duly elected and entitled to be sworn in; but until he be sworn in, the office is not *legally filled up and enjoyed by him*, within the exception in the annual indemnity act. And therefore if the disqualified person who had the greatest number of votes be sworn into the office, and afterwards qualify himself by taking the sacrament, &c. within the time allowed by the indemnity act, he is thereby recapacitated and freed from all disability, and his title to the office thereby protected; such office not having been then already vacated by judgment, or *legally filled up and enjoyed* by another person. *The King* v. *Parry and Phillips*, *M.* 52 *G.* 3. 549

COSTS.

1. If the plaintiffs sue in a superior court for a demand of above 40*s.*, which at the trial is cut down below that sum by the defence of infancy; and the jury thereupon *find the damages for the plaintiff under* 40*s.*; the defendant, residing in *Middlesex* at the time of the action brought, and liable to be summoned to the county court there, is entitled, under the stat. 23 *G.* 2. *c.* 33. *s.* 19, to enter a suggestion on the roll to that effect, entitling him to double costs of suit. *Bateman* v. *Smith* *T.* 51 *G.* 3. 301

2. The 4th sec. of stat. 43 *G.* 3. *c.* 46. providing that in actions on judgments recovered the plaintiff shall not be entitled to costs, unless by the order of the Court, or some Judge thereof; does not extend to an action brought to recover the costs of a judgment of nonsuit. *Bennett* v. *Neale*, *T.* 51 *G.* 3. 243

3. Where a demand for plumber's work and new materials found, amounting in value to 8*l*, was reduced below 5*l.* by the plaintiff's taking the old lead, and allowing for it, instead of using it as far as it would go; in which case the original demand would have been under 5*l.*; the plaintiff is not entitled to his costs, under the *Southwark* borough act, 46 *G.* 3. *c.* 87., and it is

is not a demand reduced below 5*l.* by balancing an account, within the exception of the 12th section. *Porter* v. *Philpot, T.* 51 *G.* 3. 344

COVENANT,

See Pleading, 1.

DAMAGES, INQUIRY OF.

In covenant upon a deed of indemnity, whereby the plaintiffs covenanted to indemnify the Bank of *England* against advances to *L.* and *B.* on bills of exchange to the amount of 100,000*l.*, and the defendant and others agreed to sub-indemnify the plaintiff to the same amount in certain aliquot proportions, of which the defendant's proportion was 5000*l.*; and the plaintiffs alleged that they had been obliged to pay the whole 100,000*l.* to the Bank, and demanded of the defendant his proportion of 5000*l.*; in which action the plaintiffs had judgment upon demurrer; the Court refused to refer it to the Master to compute the principal and interest due on the deed; considering that it was not a mere question of computation of principal and interest, but that it was open to the defendant, before the sheriff's jury, to enter into questions of collateral satisfaction of the plaintiff's demand from securities and effects of *L.* and *B.*, the principals, in their hands. *Denison and Others* v. *Mair, M.* 52 *G.* 3. 622

DEED,

1. Cancellation of, by mistake, see *Power*, 1.

2. Where by articles under seal the defendant bound himself under a penalty to deliver to the plaintiff by a certain day "the whole of his mechanical pieces *as per schedule annexed*;" the schedule forms part of the deed, which without it would be insensible: and therefore in covenant for the breach of the contract in not delivering the pieces; in which the plaintiff, after setting out the articles executed by the defendant, averred that to the said articles there was *then and there annexed* and subscribed a certain schedule of the said several pieces of mechanism agreed to be delivered, &c.; upon *non est factum* pleaded, it is competent to the defendant to shew in his defence, that at the time of the execution of the articles, *the schedule was not annexed*; but that in fact it was afterwards subscribed and annexed by the witness to the articles, who was the agent of both parties, immediately after the execution of the articles, and after one of the parties had left the room: though the pieces mentioned in the schedule so annexed were such as had been agreed upon by the parties before the execution of the articles. *Weeks* v. *Maillardet, M.* 52 G 3. 568

DEVISE.

1. A testator, possessed of real and personal property, after several pecuniary legacies, "gave and bequeathed all and every the residue "of the *property*, goods, and chat-"tels to be divided equally between "*A.* and *B*, share and share alike, "after all my debts paid:" and in fact the personalty was not quite sufficient to pay all the debts and legacies: but held that the word *property*, though thus followed by *goods and chattels*, was sufficient of itself to carry the realty. *Doe, Lessee of Wall*, v. *Langlands, T.* 51 *G.* 3. 370

2. Under a devise of real estate in fee to *J. M.*, *when he attains the age of* 21; but in case he dies before 21, then to his brother *when* he attains 21; with like remainders over; *J. M.*,

J. M, the devisee, takes an immediate vested interest, liable to be devested upon his dying under 21. *Doe, Lessee of Hunt and Others*, v. *Moore and Others*, *M.* 52 *G.* 3. 601

DISSENTERS.

A protestant dissenter merely stating himself as one who "preaches to "several congregations of protest-"ant dissenters," without shewing that he has any *separate* congregation attached to him, *as such teacher or preacher*, is not entitled to be admitted by the justices in sessions to take the oaths and make and subscribe the declaration as required by the toleration act, 1 *W.* & *M.* c. 18., in order to qualify himself, under the 8th clause of that statute, to officiate as such teacher or preacher. *The King* v. *The Justices of Denbighshire*, *T.* 51 *G.* 3. 285

DUTIES,

See Bond, 2.

EJECTMENT,

See Landlord and Tenant, 1, 2.

1. Service of the copy of the declaration, &c. in ejectment, *before the essoign day* of the term, on the daughter of the tenant in possession in the absence of him and his wife, is not sufficient, even though the tenant had *since* declared that he had received the same, if it do not appear that he *had received it before the essoign day*. *Roe, Lessee of Hambrook*, v. *Doe*, *T.* 51 *G.* 3. 441
2. Where a pauper had been put in possession of a cottage 40 years ago, by the then existing overseers of the poor, and had continued in the parish pay, and the cottage had been from time to time repaired by different overseers till two years ago, when the pauper disposed of it to the defendant, and went away: yet held, that the existing overseers could not maintain ejectment for it, having no derivative title as a corporation from their predecessors, so as to connect themselves in interest with the overseers by whom the pauper was put in possession; and the pauper having done no act to recognize his holding under the demising sets of overseers. *Doe, Lessee of Grundy and Others*, v. *Clarke*, *M.* 52 *G.* 3. 488

ESCAPE.

If upon the execution of a writ of capias ad satisfaciendum, which requires the sheriff to take and *keep the body*, so that he may have it on the return-day of the writ at *Westminster to satisfy the plaintiffs* of their damages, costs, and charges, the sheriff, before the return-day, receive the money due from his prisoner, and thereupon liberate him, before he has paid it over in satisfaction to the party entitled to it, he is answerable as for an escape; and his rereturn under the common rule, of cepi corpus, and that he detained the prisoner until he satisfied *him* (the sheriff) the levy-money indorsed on the writ, which he had ready, as commanded, &c is of no avail. *Slackford and Another, Executrix and Executor of Slackford*, v. *Austen, Sheriff of Surry*, *M.* 52 *G.* 3. 468

EVIDENCE,

See Arrest, 4. Forgery, 1. Partners, 1, 2. Perjury, 1. Process, 1.

1. In trespass for an assault and false imprisonment, which the defendant justified as Serjeant at Arms of the House of Commons, acting under the Speaker's warrant for arresting the plaintiff, a member of the House, for a breach of privilege; wherein

wherein the issue was upon an alleged excess of authority in the officer executing the warrant by using such military force as was improper, excessive, and unnecessary for the purpose, and breaking into the plaintiff's house after demand of entrance and refusal; evidence of acts of violence by the mob, committed in parts adjacent, though out of view and hearing of the plaintiff in his house, appearing to be connected with the same purpose as actuated those about the plaintiff's house, was admitted to shew the danger and difficulty of executing the warrant by force against the plaintiff in his own house, without the aid and protection of the military. *Burdett* v. *Colman*, *T.* 51 *G.* 3. 183

2. For evidence of *arrest*, and of plaint *made* and *withdrawn* in the sheriffs' court of *London*, see *Jurisdiction*, 1.

3. Proof of the execution of a bill of sale of a ship to the defendant is not evidence to charge him as an owner with stores furnished to the ship, without shewing his assent to such sale. Neither is the register of the ship, naming him as a part-owner, made by and upon the oaths of others, primâ facie evidence to charge him as owner, without his assent or adoption. *Tinkler* v. *Walpole*, *T.* 51 *G.* 3. 226

4. The *leaving with a woman at the defendant's house*, whom the witness *believed* to be a menial servant of the defendant, a *copy* of a summons to appear and answer to an information before magistrates, charging him with an offence against the excise laws, (to which woman the original was also shewn;) is a sufficient *summons* within the stat. 32 *G.* 2. *c.* 17. *Rex* v. *Chandler*, *T.* 51 *G.* 3.

5. Quære, how far evidence that an illicit still was found concealed in a garden of the defendant's house, apparently just worked off; but without proof that the defendant himself was in or near his house at the time, or otherwise connected with it; will warrant a conviction of him, as having such illicit and concealed still *in his custody and possession*, under the stat. 19 *G.* 3 *c.* 50 *s.* 2. *ibid.*

6. In trover for a bond the plaintiff may give parol evidence of it to support the general description of the instrument in the declaration, without having given the defendant previous notice to produce it; as the nature of the action gives sufficient notice to the defendant of the subject of inquiry, to prepare himself to produce it, if necessary, for his defence. *How and Another*, *Executors of Nicholls*, v. *Hall*, *T.* 51 *G.* 3. 274

7. If the plaintiff in an action for a malicious prosecution offer to prove at the trial the original record of the indictment and acquittal, or a true copy thereof, such evidence must be received, though there were no order of the Court, or fiat of the Attorney-General, allowing the plaintiff a copy of such record: but the officer who, without such authority, produces the record, or gives a copy of it, to the party, is answerable for the contempt of Court in so doing; and the Judge at nisi prius would not compel him to produce the record in evidence without such authority. *Legatt* v. *Tollervey*, *T.* 51 *G.* 3. 302

8. Where a testator, between 50 and 60 years ago, devised land to his son for life, remainder to his grandson for life, remainder to the heirs of the body of the grandson, remainder to the lessor of the plaintiff in tail; between which latter and the defendant, the devisee in fee of the son, the question was whether the land in dispute, which had been occupied by the son in the lifetime of the testator, was part of the entailed estate, or had been acquired by

by his own purchase; evidence of *reputation that the land had belonged to Sir J S., and was purchased of him by the first testator*, is not admissible, though coupled with corroborative parol evidence that the land had belonged to Sir *J. S.* before the occupation of it by the son, and also by a deed of conveyance of another farm in the same place from the first testator to a younger son about the same period, in which it was recited that the land thereby conveyed had been then lately purchased, *amongst other lands*, by the testator, of Sir *J. S.* *Doe, Lessee of Ann Didsbury and C. Flint*, v. *Thomas and Others*, *T.* 51 *G.* 3. 323

9 *Qu.* Whether general evidence of reputation as to a prescriptive right of digging stones on the lord's waste, annexed to a particular estate, be admissible. Two Judges against two. But one of those who held the affirmative thought it required other evidence of the right to be first laid as a foundation. It seems, however, that such evidence may be given as to a particular custom, though not as to a private prescription: by three to one. *Moorewood* v *Wood*, *M.* 32 *G.* 3. *B. R.* 327

10. Where a person had been dead a great number of years, whose hand-writing was required to be proved, it was done by shewing the similarity of the hand-writing in question to the hand-writing of his will; and no objection was taken to it, either at the bar or by the Court. *ibid.*

11. Traditionary reputation is evidence of boundary between two parishes and manors; and this, though the old persons deceased making the declarations claimed rights of common on the respective wastes, which might be enlarged by such evidence; there being no litigation pending or in contemplation at the time, which could induce a belief that they had in view to make evidence for themselves, though the boundary had long before been and afterwards continued to be vexata questio. *Nicholls* v. *Parker*, *Exeter Sum. Assizes* 1805, cor. *Le Blanc* J. 331

12. But evidence of reputation of a boundary between two estates was rejected. *Clothier* v. *Chapman*, *Bridgewater Summer Assizes* 1835, cor. *Graham* B. *ibid.*

13. To an action of trespass for cutting down and converting trees, which the defendant justified as growing upon his soil and freehold, the plaintiff replied that *the trees* were his *freehold*, and not the freehold of the defendant: and this was held to be proved by shewing that they grew on a certain woody belt, 15 feet wide, which surrounded the plaintiff's land, but was undivided by any fences from the several closes adjoining, of which it formed a part, belonging to different owners; and that from time to time the plaintiff and his ancestors, at their pleasure, cut down, for their own use, the trees growing within the belt; and that the several owners of the different closes inclosing the belt never felled trees there, though they felled them in other parts of the same closes; and that when they made sale of their estates, the trees in the belt were never valued by their agents, because they were reputed and considered to belong to the plaintiff and his ancestors; in which the several owners acquiesced. *Sir Thomas Stanley, Bart.* v. *White*, *T.* 51 *G* 3. 332

14. As to evidence on non est factum of a schedule *annexed to the deed* after the execution, see *Deed*, 1.

EXCISE.

See CONVICTION.

EXECUTION.

If upon the execution of a writ of capias ad satisfaciendum, which requires the sheriff to take and *keep the body*, so that he may have it on the return-day of the writ at *Westminster to satisfy the plaintiffs* of their damages, costs, and charges; the sheriff before the return-day receive the money due from his prisoner, and thereupon liberate him, before he has paid it over in satisfaction to the party entitled to it, he is answerable as for an escape: and his return under the common rule of cepi corpus, and that he detained the prisoner until he satisfied *him* (the sheriff,) the levy-money indorsed on the writ, which he had ready, as commanded, &c. is of no avail. *Slackford and Another, Executrix and Executor of Slackford* v. *Austin, Sheriff of Surrey, M.* 52 *G.* 3. 468

FORGERY.

One indicted for forgery of a note, having got possession of and swallowed it, parol evidence was permitted to be given of the contents of the note: and being destroyed no notice was given to produce it. Quære *Sprugge's* case before *Buller* J. on the northern circuit, cited. 276

FREEHOLD.

To an action of trespass for cutting down and converting trees, which the defendant justified as growing upon his soil and freehold, the plaintiff replied that the trees were his freehold, and not the freehold of the defendant; and this was held to be proved by shewing that they grew on a certain woody belt, 15 feet wide, which surrounded the plaintiff's land, but was undivided by any fences from the several closes adjoining, of which it formed part, belonging to different owners; and that from time to time the plaintiff and his ancestors, at their pleasure, cut down, for their own use, the trees growing within the belt, and that the several owners of the different closes inclosing the belt never felled trees there, though they felled them in other parts of the same closes; and that when they made sale of their estates, the trees in the belt were never valued by their agents, because they were reputed and considered to belong to the plaintiff and his ancestors, in which the several owners acquiesced. *Sir Thomas Stanley, Bart.* v. *White, T.* 51. *G.* 3. 332

FRIENDLY SOCIETIES.

In order to prevent the settlement of an apprentice bound to a master who was residing in the parish under a certificate from a friendly society, by virtue of the stat. 33 *G.* 3. *c.* 54. it is not sufficient for the certificated parish merely to produce the certificate upon appeal to the sessions from an order of removal of the apprentice to such parish, but they must also shew that such certificate had been *delivered* to the parish officers, as mentioned in sec. 17. of the act, before the service of the apprentice. *The King* v. *the Inhabitants of Egremont, T.* 51 *G.* 3. 253

GAME,

See Hunting.

GUARANTEE,

See Pleading, I.

HABEAS CORPUS,

See Pressing.

HOTCHPOT INTEREST,

See Insurance, 7.

HUNTING.

The plaintiff's dogs having hunted and caught, on the defendant's land, a hare started on the land of another, the property is thereby vested in the plaintiff, who may maintain trespass against the defendant for afterwards taking away the hare. And so it would be, though the hare, being quite spent, had been caught by a labourer of the defendant for the benefit of the hunters. *Churchward* v. *Studdy*, *T.* 51 *G.* 3. 249

IMPRESS,

See PRESSING.

INDEMNITY,

See PLEADING, 1.

INDEMNITY ACT, (*Annual.*)

See CORPORATION, 2.

INDICTMENT,

See PERJURY.

1. The exchanging guineas for bank-notes, taking the guineas in such exchange at a higher value than they were current for by the king's proclamation, is not an offence against the stat. 5 & 6 *Ed.* 6. *c.* 19. *The King* v. *De Yonge*, *T.* 51 *G.* 3. 402

2. A great number of persons at *Birmingham*, (2500) admitting of an extension to 20,000, covenanted by a deed of co-partnership to raise a large capital (20,000*l.*) by small subscriptions of 1*l.* for each share, for the purpose of buying corn, grinding it, making bread, and dealing in and distributing flour or bread amongst the partners, under the name and firm of *The* Birmingham *Flour and Bread Company*, and under the management of a committee; and covenanted that no partner should hold more than 20 shares, unless the same should come to him by marriage, &c. or act of law; and that each member should weekly purchase of the co-partnership a certain quantity of bread or flour, not exceeding 1*s.* in value, for each share, as the committee should appoint; and that no partner should assign his share, unless the assignee should enter into covenant with the other partners for the performance of all covenants in the original deed; and that the majority of partners at a public meeting may make by-laws to bind the whole.

And upon an indictment against several of the partners, charging them, *upon the stat.* 6 *G.* 1. *c.* 18. *s.* 18 *and* 19., as for a public nusance, with intending to prejudice and aggrieve divers of the king's subjects in their trade and commerce, under false pretences of the public good, by subscribing, collecting, and raising, and also by *making subscriptions* towards raising, a large sum for establishing a new and unlawful *undertaking, tending to the common grievance*, &c. of great numbers of the king's subjects in their trade and commerce, *i. e.* making subscriptions towards raising 20,000*l.* in 20,000 shares, for the purpose of buying corn, and grinding and and making it into flour and bread, and dealing in and distributing the same; and also with presuming *to act as a corporate body*, and pretending *to raise a transferable and assignable stock*, for the same purposes;

The jury having found specially, that the company was originally, (during the high price of provisions) instituted from *laudable motives, and for the purpose of more regularly supplying the town of* B. *and the neighbhood with flour and bread*, and that the same *was originally, and still is beneficial to the inhabitants at large*, but *is* (*i. e.* at the time of finding the special verdict, which does not include the time of the offence

charged in the indictment) prejudicial to the bakers and millers of the town and neighbourhood in their trades:

The Court gave judgment for the defendants, considering the case not to be within the stat. 6 *G.* 1. *c.* 18. *s.* 18 & 19., on which the indictment was framed. For,

1st, The *fact* of any nusance is negatived by the special verdict, *during the time to which the offences charged* relate.

2dly, Though the defendants are found to have raised a large capital by small subscriptions, which is one ingredient of a nusance mentioned in the act; (*i. e.* where referable to undertakings prohibited by the act;) and though the shares were made transferable *to a certain extent,* (*but to a certain extent only,*) *i. e.* upon the vendee's entering into similar covenants with the original partners; which may be another ingredient of a nusance in the act; and though the defendants have assumed certain equivocal indicia of a corporation, *i. e.* the taking a common name, (though this was not found by the jury,) having a managing committee, general meetings, and a power to make by-laws; yet all these things being done *for the purpose of buying corn and making it into flour and bread for the supply of the partners,* which does not, upon the face of it, appear to be a dangerous and mischievous undertaking, tending to the common grievance, &c. nor is found in fact so to be; and not being one of the specific nusances prohibited by the statute; namely, the acting or pretending to act as a body corporate; the raising or pretending to raise transferable stock; (even if that be a nusance per se within the act, without reference to the nature of the undertaking;) the transferring or pretending to transfer any shares in such stock without authority by statute; the acting or pretending to act under any charter granted for special and different purposes by persons using such charter for raising and transferring stock; or so acting under any obsolete charter, become void or voidable by non user, abuser, or dissolution; it is not within the terms and intent of the nusances created by that statute. *The King* v. *Webb, Barber, Townshend, Parkes, Ledsam, Warner, Pritchet, and Godrington, T.* 51 *G.* 3. 406

INFERIOR COURT,

See COSTS, 1. 3.

INHERITANCE,

See ACTION ON THE CASE, 2.

INQUIRY, WRIT OF.

1. Leave was given to the plaintiff in debt on bond conditioned to perform an award, after judgment recovered, to execute a writ of inquiry upon the stat. 8 & 9 *W.* 3 *c.* 11. *s.* 8. after a writ of error allowed, and to sign a new judgment on the terms of paying costs, and putting the defendant in statu quo, &c. *Hanbury* v. *Guest, T.* 51 *G.* 3. 401

2. The Court would not direct a writ of inquiry to be executed after judgment by default in an action of *debt;* but referred it to the master to ascertain what was due, upon the application of the defendant after execution executed. *Taylor* v. *Capper, T.* 51 *G.* 3. 442

3. After judgment by default in an action of indebitatus assumpsit, to recover del credere commissions for guarantying sums insured upon policies; which commissions are due upon entering into the contract of guarantie; the defendant cannot set off in reduction of damages the amount of losses not indemnified. *Caruthers* v. *Graham, M.* 52 *G* 3. 406

4. In covenant upon a deed of indemnity, whereby the plaintiffs covenanted to indemnify the Bank of

England

England against advances to *L.* and *B* on bills of exchange to the amount of 100,000*l*, and the defendant and others agreed to indemnify the plaintiffs to the same amount, in certain aliquot proportions, of which the defendant's proportion was 5000*l.*; and the plaintiffs alleged that they had been obliged to pay the whole 100,000*l* to the Bank, and demanded of the defendant his proportion of 5000*l.*; in which action the plaintiffs had judgment upon demurrer; the Court refused to refer it to the Master to compute the principal and interest due on the deed; considering that it was not a mere computation of principal and interest, but that it was open to the defendant before the sheriff's jury, to enter into questions of collateral satisfaction of the plaintiffs' demand from securities and effects of *L.* and *B.*, the principals, in their hands. *Denison and Others* v. *Mair*, *M.* 52 *G.* 3. 622

INSURANCE.

1. If a neutral *American ship*, insured here, be captured by a *French* ship, and condemned in a *French* Court *as prize*, upon the express ground stated in the sentence of condemnation, (which is evidence for this purpose,) that the ship was not properly documented according to the existing treaty between *France* and the United States of *America*, (conjointly with the suppression of papers by the captain after the capture; on which no opinion was given by the Court;) the neutral assured cannot recover their loss against the *British* underwriter, although there was no warranty or representation that the ship was *American*; the neglect of the ship-owners themselves, who are bound at their peril to provide proper national documents for their ship, being in such a case the efficient cause of the loss. Neither can the agent of the assured, some of whom were also interested in the cargo as well as the ship, recover for the loss of the cargo insured, which was also condemned at the same time and for the same reason; such assured of the goods being implicated in the same neglect in their character of ship-owners. But it is otherwise in the case of a mere assured of *goods*, who is not answerable for the proper documenting of the *ship*, without a warranty or representation of her national character. *Bell and Others* v. *Carstairs*, *T* 51 *G.* 3. 374

2. A ship being obliged to put into a place of safety in the course of her voyage, in consequence of damage incurred by a sea-peril; if the owner do not abandon, but merely apply to the underwriters for directions how to proceed upon an estimate of the expences of repair, who decline interfering, he cannot afterwards convert it into a total loss, on account of the expences of the salvage being found in the result to have exceeded the value of the ship, which was ultimately sold in the place into which she had been driven by distress; though the sale was directed by the assured to be made on account of all concerned. *Martin* v. *Crokatt*, *M.* 52 *G.* 3. 465

3. If a ship be insured at and from a certain place, where in fact she is not at the time, but arrives there after some interval, (but the fact is not communicated to the underwriters, who do not call for information on the subject;) it is a question for the jury, whether the delay which intervened materially varied the risk: and they held it did not in a case where the insurance being effected on the 13th of *August* in *London*, on goods at and from *Heligoland*

goland to the *Baltic*, and the vessel did not sail from the *Thames* till the 27th, to which was to be added the further time for reaching *Heligoland*. *Hull* v. *Cooper*, *M.* 52 *G.* 3. 479

4. Where in a policy of insurance on a voyage up the *Mediterranean* on the coast of *Spain*, the underwriters stipulated that they would not be liable higher up the *Mediterranean* than *Tarragona*; the assured could not recover where the captain of the ship, through entire ignorance of the coast, when the occasion and the terms of the policy required him to distinguish, went into *Barcelona*, an enemy's port, which is higher up than *Tarragona*: for this was either a deviation without any just cause, (and on this ground the plaintiff was held not entitled to any return of premium;) or there was a failure of an implied warranty on the part of the assured, that a captain and crew of competent skill and knowledge for the declared purpose of the voyage should be provided. *Tait* v. *Levi*, *M.* 52 *G.* 3. 481

5. A wrong description of the person, to whom a licence from the Crown to trade with the enemy is granted, invalidates it. As where he was described to be "of *London*, merchant;" whereas he was resident at the time at *Heligoland*; from whence he passed into *Germany*, *intending* to return immediately *and settle in London*. *Klingender* v. *Bond*, *M.* 52 *G.* 3. 484

6. An insurance was effected on goods on board *ship or ships* from the *Canary Islands* to *London*, and at the time the assured's agent, who effected the policy, knew that one of the *ship or ships* was named the *President*; and at the same time there was a paper of communication stuck up at *Lloyd's*, that "the *Howard*, *Marsh*, arrived off *Dover* from *Teneriffe*; sailed 24th ult.; on the 27th, off the *Salvages*, fell in with the *President*, *Owens*, from *Lanzarette*, *deep and leaky*:" but the agent did not communicate his knowledge of the ship's name to the underwriters: held that the policy was thereby avoided, though the intelligence afterwards turned out to be false. *Lynch* v. *Dunsford*, *in Error*, *M.* 52 *G.* 3. 494

7. The ship *Ross* belonging to the plaintiffs, and the ship *Atlantic*, (on which this question arose) to *Fisher* and Co., and the cargoes to other persons, were insured on a former voyage, and captured by the *Spaniards*, and carried into *Spain*; and the underwriters upon the *Atlantic*, of whom the defendant was one, paid as for a total loss. But while proceedings for condemnation were pending in the Prize Court in *Spain*, *Cowan* (residing there) having been severally empowered by the different owners to claim restitution, and to enter into compromise with the captors for giving up part of the cargoes on the restitution of the remainder and of the ships, and to defray all costs and charges thereon, *and to forward the ships* and goods restored *to London*, and to pay all demands on the ships and goods, agreed with the captors, subsequent to the cessation of hostilities, (and the captures and subsequent peace were held in the Court of Admiralty here to bind the property captured,) that upon giving up to them part of each cargo, the rest and the ships should be *restored for the common benefit of the original owners of both ships and cargoes, in the lump*. On which *Cowan* advised the plaintiffs that he should consign the *Atlantic* to them, with their own ship, the *Ross*, and draw bills on them, (which were afterwards accepted and paid,) for the *general expences* of effecting the arrangement with the

the

the captors, and for the outfit of *both ships*, and referred to this information to guide them with respect to *insurance*: on which the plaintiffs insured the *Atlantic* by a policy, "on ship, or on salvage charges, or on any interest as may "be hereafter declared by the assured;" and after a subsequent capture of her by the *French*, declared against the defendant, (who had also underwritten this second policy) *and averred the interest to be, 1st, in themselves, and, 2dly, in* Fisher *and Co*, the original owners of the ship *Atlantic*. And held that the plaintiffs had an insurable interest, as well on account of the whole property captured (of which they owned the other ship *Ross*) having been restored at the sacrifice of part of the cargoes, for the common benefit of all; which created in them a *hotchpot interest* in the ship *Atlantic*; and also as representing *Cowan*, who was empowered to act as attorney for all the original owners, and to whom such restitution in hotchpot was made for their common benefit, and who had incurred charges and drawn bills on the plaintiffs on account of the common concern, which had been accepted and paid by them; and *Cowan* having had authority to insure from *Fisher* and Co., the original owners, under their order, on obtaining restitution, *to forward the ship to* London, and to pay all claims and demands on her. Though the plaintiffs would be amenable out of the money recovered to the several persons interested, in proportion to their several claims on the property in hotchpot, and amongst others to the defendant himself, as an underwriter on the first policy, upon which he had paid as for a total loss to *Fisher* and Co. *Robertson and Others* v. *Hamilton*, *M.* 52 *G.* 3. 522

JOINDER IN ACTION.

Where a banking trade was carried on in the name of father and son, in whose joint names the accounts with the customers were headed in the banking books, the father cannot sue alone for the balance of an account over-drawn by a customer, without giving distinct proof that the son, though proved to be a minor, had no property in the banking fund, or share in the business as a partner. *Teed* v. *Elworthy*, *T.* 51 *G.* 3. 210

JURISDICTION,

See PERJURY. 1.

1. In an action for maliciously arresting and imprisoning the plaintiff upon a plaint for debt in the sheriffs' court in *London*, without reasonable or probable cause, it is sufficient to allege and prove that the plaint was made "at the sheriffs' court in *London*, *before* J. A., *one* of the sheriffs, &c.

The usual course of that court, upon the abandonment of a suit by the plaintiff, being to make an entry in the minute-book of "*withdrawn*" by the plaintiff's order, opposite to the entry of the plaint; held that proof of such entry in the minute-book was sufficient to prove an allegation that the former suit was "wholly ended and determined."

And a general allegation that the plaintiff was *arrested* "under and by virtue of the plaint," is proved by shewing the plaint entered and the subsequent arrest; though it also appeared that the officer making the arrest first received a paper in the nature of a warrant, (but which was no warrant, but only the parol direction of the sheriff, which is good by the custom, reduced into writing to avoid mistake,) directing him to make the arrest; and though the stat. 12 *Geo.* 1. *c.* 29. requires a previous

previous affidavit of the debt, which had been made in this case. *Arundell* v. *White*, *T*. 51 *G* 3. 216

2. The stat 12 *Car*. 2. *c* 24. *f*. 45. giving summary jurisdiction in offences against the excise, amongst others, to two or more justices of the peace, *residing near to the place where such offence shall be committed*, is confined to justices of the peace *of the county*, &c. wherein the offence was committed. *Rex* v. *Chandler*, *T* 51 *G* 3. 267

See further *Conviction*.

3. In declaring in scire facias on a recognizance of bail, taken in an action by original, there is no incongruity in stating that the recognizance was taken in an action "then "lately *commenced* and depending *in* "*B*. *R*;" for the action may be said to *commence* in this court when its jurisdiction attaches upon the original writ sued out of Chancery. *Mayo* v. *Rogers and Another*, *Bail of Cracklow*, *M*. 52 *G*. 3. 5 9

JUSTICES OF PEACE,

See Jurisdiction, 2.

In trespass against magistrates for an act done by them ex officio, the plaintiff must shew at nisi prius that he proceeded upon a writ sued out within six months after notice to them of the action, although there be a continuing cause of action; and therefore the plaintiff must shew a return and continuance of the first writ if the second be out of the time fixed by the notice. *Weston* v. *Fournier and Another*, *M*. 52 *G*. 3. 491

LABOURERS,

See Wages, Rate of. Master and Servant.

LANDLORD AND TENANT.

1. Where tenant from year to year underlet part of the premises, and then gave up to his landlord the part remaining in his own possession, without either receiving a regular notice to quit the whole, or giving notice to quit to his sub-lessee, or even surrendering that part in the name of the whole (supposing that any thing short of a regular notice to quit from the landlord to his immediate tenant would, after such sub-letting, have determined the tenancy in the whole; yet the landlord cannot entitle himself to recover against the sub-lessee, (there being no privity of contract between them,) upon giving half a year's notice to quit in his own name, and not in the name of the first lessee; for as to the part so underlet the original tenancy still continued undetermined *Pleasant*, *Lessee of Hayton*, v. *Benson*, *T*. 51 *G*. 3. 234

2. Where a farm was leased for 21 years, at a rent of 180*l*. per ann. consisting, as described in the lease, of *the Town Barton*, and its several parcels described by name, at the rent of 83*l*, other closes named, at other rents of 5*l*., 5*l*, and 1*l*.; and the *Shippen Barton*, and its several parcels described by name, at 86*l*.: with a power reserved to either party to determine the lease at the end of 14 years, on giving two years' previous notice: held that a notice by the landlord to his tenant to quit "*Town Barton*, &c *agreeably to the terms of the covenant* between us on the expiration of the 14th year of your term," given in due time, was sufficient. *Doe*, *Lessee of Rodd*, v. *Archer*, *T*. 51 *G*. 3. 245

3. A notice to quit a part only of premises leased together is bad. *ibid*.

LIBEL,

See Privilege.

LICENCE TO TRADE.

A wrong description of the person, to whom a trading licence from the crown

crown to trade with the enemy is granted, invalidates it; as where he was described to be "of *London*, merchant;" whereas he was resident at the time at *Heligoland*, from whence he passed into *Germany*, intending to return immediately, and settle in *London*. *Klingender* v. *Bond*, *M.* 52 *G.* 3. 484

LONDON, SHERIFFS' COURT OF,

See JURISDICTION, I.

MALICIOUS PROSECUTION.

If the plaintiff, in an action for a malicious prosecution, offer to prove at the trial the original record of the indictment and acquittal, or a true copy thereof, such evidence must be received, though there were no order of the Court, or fiat of the Attorney-General, allowing the plaintiff a copy of such record: but the officer who, without such authority, produces the record, or gives a copy of it, to the party, is answerable for the contempt of Court in so doing; and the Judge at nisi prius would not compel him to produce the record in evidence, without such authority. *Legatt* v. *Tollervey*, *T.* 51 *G.* 3. 302

MASTER AND SERVANT.

Under the stat. 20 *G.* 2. *c.* 19. *s.* 2. for regulating servants in husbandry, artificers, and other labourers there mentioned, if a justice of the peace, upon a complaint made to him of the misconduct of such persons in their employments, sentence the offender to be committed to the house of correction for a time not exceeding one calendar month, he must, if he intend to proceed upon that statute, also sentence him *there to be corrected and held to hard labour*: but the statute gives the justice an option to punish the offender in that manner, or otherwise, by abating part of his wages, or by discharging him from his employment. And the meaning of the terms, "there *to be corrected*," is to be understood of a correction by whipping. But this latter punishment cannot be inflicted upon the like offender under the stat. 6 *G.* 3. *c.* 25., which enables the justice to commit the offenders to the house of correction for any time not exceeding three months, nor less than one month; nor can the punishments inflicted by the two acts be blended. The *employer* of the servant is the master for whose service he is retained, and not the bailiff of the farm, who in fact hires the servant. *The King* v. *Hoseason*, *M.* 52 *G.* 3. 605

MANDAMUS.

The stat. 16 *Car.* 1. *c.* 4. *s.* 2. having continued the stat. 1 *Jac.* 1. *c.* 6., the 2d and 3d sections of which last mentioned statute, in extension of the stat. 5 *Eliz.* *c.* 4. authorizes the justices in sessions (with the sheriff, if he conveniently may,) to rate the wages of any labourers, &c. or workmen whatsoever, &c.; this Court granted a mandamus to the justices, &c. of *Kent*, to hear an application of the journeymen millers of that county, praying them to make such rate; which application the justices had refused to hear upon the merits; considering that they had no jurisdiction over other than the wages of servants in husbandry. *The King* v. *The Justices of Kent*, *T.* 51 *G.* 3. 395

MIDDLESEX COUNTY COURT.

If the plaintiffs sue in a superior court for a demand of above 40*s*., which at the trial is cut down below that sum by the defence of infancy;

infancy; and the jury thereupon find the damages for the plaintiff under 40*s.*; the defendant residing in *Middlesex* at the time of the action brought, and liable to be summoned to the court there, is entitled, under the stat. 23 *G.* 2. *c.* 33. *s.* 19, to enter a suggestion on the roll to that effect, entitling him to double costs of suit. *Bateman* v. *Smith*, *T.* 51 *G.* 3. 301

MILLERS.

See WAGES, RATE OF.

MONEY,

See INDICTMENT, 1.

NOTICE TO QUIT,

See LANDLORD AND TENANT, 1. 2.

NUSANCE,

See INDICTMENT, 2.

OFFICE,

See CORPORATION, 2.

OUTLAW.

A bankrupt who has been waived, (or outlawed,) and her person arrested and goods taken by the sheriff under a writ of capias utlagatam is not entitled to be relieved on summary motion from such arrest and levy, except upon the terms of appearing to the action, and putting in and perfecting special bail, although the plaintiff had also proved her debt under the commission, and received a dividend, after which the action was commenced for the balance. *Summervil* v. *Isabella Watkins and Others*, *M.* 52 *G.* 3. 536

OVERSEERS,

See POOR-OVERSEERS.

PARLIAMENT.

See PRIVILEGE.

PARTNERS.

1. Where a banking trade was carried on in the name of father and son, in whose joint names the accounts with the customers were headed in the banking books, the father cannot sue alone for the balance of an account over-drawn by a customer, without giving distinct proof that the son, though proved to be a minor, had no property in the banking fund, or share in the business as a partner. *Teed* v. *Elworthy*, *T.* 51 *G.* 3. 210
2. Where the plaintiffs had dealt for a long time with two partners, not knowing that they had a third partner during part of the time, and furnished them with goods, and received payments on account generally; and previous to the time when the secret tri-partnership was dissolved, goods had been furnished, to cover which bills had been paid to the plaintiffs by the two ostensible partners, which were dishonoured after the secret dissolution of the tri-partnership, and then other goods were furnished as before; yet as the dishonoured bills were afterwards delivered up by the plaintiffs upon the receipt of the subsequent good bills; which latter were more than sufficient to cover the debts of the tri-partnership, though not to cover, in addition, the goods furnished after the dissolution of it; held that such delivering up of the old dishonoured bills, upon receipt of the new good bills, was evidence of a particular appropriation of such new bills in payment and discharge of the old debt; of which the secret third partner might avail himself in an action on the case for goods sold and delivered, brought against

against him jointly with the other two partners.

But as the other two partners had suffered judgment to go by default, the plaintiffs could not be nonsuited, but the third partner, who defended, was entitled to a verdict. *Newmarch and Tealby* v. *Clay and William and Thomas Lumb*, *T.* 51 *G.* 3. 239

3. As to what partnerships are within the st. 6 *G.* 1. *c.* 18. against raising subscriptions for unlawful undertakings tending to the common grievance, &c. of the subjects in their trade and commerce; see *Indictment*, 2., and *Rex* v. *Webb and Others*, *T.* 51 *G.* 3. 406

PAYMENT ON ACCOUNT,

See PARTNERS, 2,

Where a creditor has debts due to him on different accounts, he may apply a payment made to him by his debtor to either of such debts, unless it be specified at the time to which debt it is to be applied. *Hall* v. *Wood et Uxor*, before Lord *Mansfield* C. J. at *Westminster*, in *Hil.* 1785. 243

PERJURY.

An indictment for perjury in a cause, alleging that the cause was tried at the assizes before *E. W.*, one of the Judges, &c. before whom the perjury of the defendant was assigned, is proved in substance by the nisi prius record, which stated in the usual form, that the cause was tried before the then *two* Judges of assize, one of whom was *E. W.* *Rex* v. *Alsford*, at *Bridgewater* summer assizes, 1776, cor. *Eyre* B., and afterwards before all the Judges in *Hilary* Term 1777. 218

PLAINT IN SHERIFFS' COURT OF LONDON.

As to allegations of *arrest* and of *plaint made* and *withdrawn*; see *Jurisdiction*, 1.

PLEADING,

See JURISDICTION, 1. 3.

1. The plaintiffs having by indenture (to which they, and *L.* and *B.*, and the defendant, together with others, were parties,) covenanted to indemnify the Bank of *England* against the advance of 100,000*l.* to *L.* and *B.* for nine months, upon certain bills of exchange, to which the plaintiffs, as original guarantees to the Bank, had agreed to become parties by drawing, accepting, or indorsing the same; which bills were stipulated to be drawn, accepted, and indorsed for certain proportional sums, by certain of the parties (plaintiffs,) in manner and form as agreed upon; and which were stated as intended to be drawn *at 65 days after date, or in such other manner* as should be agreed upon; and which bills might be renewed, not exceeding three renewals within the nine months; and the defendant, as a sub-guarantee (with many others, whose names were set down in a schedule, each for a certain sum,) having agreed to indemnify the plaintiffs to the extent of 2000*l.* against any loss on such bills;

Held that the plaintiffs having, on the failure of *L.* and *B.*, been obliged to pay the whole 100,000*l.*, with interest, to the Bank for its advances on all the bills, it was not necessary for them, in declaring on the covenant against the defendant, a sub-guarantee, for the amount of his particular stipulated indemnity, to specify the several dates and times of payment, &c. of the different bills which were drawn, accepted, or indorsed by them; such discriminating particulars of the mass of bills drawn having become unnecessary in the event, inasmuch as the plaintiffs, the primary guarantees of the Bank, had been obliged to pay the whole sum for which all the bills

bills were drawn; and consequently each sub-guarantee had become liable for the whole amount of his separate sub-indemnity. But it is sufficient to allege, generally, that the Bank had advanced and lent to *L.* and *B.* the whole sum of 100,000*l* by way of discount *on certain bills of exchange drawn, accepted, and indorsed in manner and to the respective amounts mentioned in the indenture:* that *L.* and *B.* had drawn *certain bills of exchange according to the form and effect, true intent and meaning of the indenture, to the amount of* 100,000*l*, for the purpose of being discounted by the Bank, for the use of *L.* and *B. in the several and respective amounts mentioned in the deed*, videlicet, (stating the amount of the several bills for the proportional sums, and the names of the primary guarantees by whom they were to be drawn, accepted, or indorsed, as agreed upon;) and that before the said bills became due *L.* and *B.* became unable to pay them, and did not at any time pay them; by reason of which the plaintiffs were obliged to pay to the Bank 100,000*l.* on account of such bills, &c.; and that the defendant (and the other sub-guarantees) had not indemnified the plaintiffs.

But as the facts of such bills having been drawn and become due, (out of which arose the obligation of the plaintiffs to pay the Bank the amount of such bills, and the obligation of the defendant to indemnify the plaintiffs for his proportion of such payment,) and the fact of such payment by the plaintiffs, constitute the gist of such an action, they must be alleged with *time and place;* and therefore where it was only alleged that the Bank (after the deed of covenant,) to wit, *on the 28th of* August 1810, *at* Westminster, &c. advanced and lent to *L.* and *B.* 100,000*l.* by way of discount on certain bills of exchange, &c.: (as before:) that *L.* and *B.* *drew certain bills of exchange*, &c to the amount of 100,000*l* &c, which said bills were accepted, &c.: that before the said bills became due *L.* and *B.* became unable to pay, &c: by reason of which said premises the plaintiffs became damnified and were forced and obliged to pay, and did THEN and there necessarily pay the Bank 100,000*l.* on account of such bills, &c.: the time was held to be insufficiently laid: for the word *then* must refer to the 28th of *August*, the very day of the advance by the Bank upon the bills, which could not have become due till a subsequent day; and then it would negative the allegation that the plaintiffs were forced and obliged to pay the Bank on the same day, and make the whole repugnant and senseless: and advantage may be taken of this on special demurrer. *Denison and Others* v. *Richardson*. *T.* 51 *G.* 3. 29

2. In declaring in scire facias on a recognizance of bail, taken in an action by original, there is no incongruity in stating that the recognizance was taken in an action "then lately *commenced* and depending in B. R.;" for the action may be said to *commence* in this court, when its jurisdiction attaches upon the original writ sued out of Chancery. *Mayo* v. *Rogers and Another, Bail of Cracklow*, *M.* 52 *G.* 3. 539

POOR, OVERSEERS OF.

Where a pauper had been put in possession of a cottage 40 years ago by the then existing overseers of the poor, and had continued in the parish pay, and the cottage had been from time to time repaired by different overseers till two years ago, when the pauper disposed of it to the defendant, and went away: yet held that the existing overseers could